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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 491

BOARD OF SUPERVISORS OF SUFFOLK COUNTY, NEW YORK, *et al.*, *Appellants*

v.

I. WILLIAM BIANCHI, JR., *et al.*, *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANTS

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANTS

Opinions Below

The June 15, 1966, opinions of the Three-Judge Court (R. 189-198) is reported at 256 F. Supp. 617.

The August 4, 1966, supplemental opinion-order of the District Court, along with the dissenting opinion of Dooling, *D.J.*, is not reported and appears in this Brief as Appendix D.

The February 1, 1965, opinion of the Statutory Court (R. 123-136) is reported at 238 F. Supp. 997.

The April 8, 1963, opinion of the District Court, Bruchhausen, *D.J.*, (R. 108-111) is reported at 217 F. Supp. 166.

Jurisdiction

The judgment of the District Court was entered June 15, 1966 (R. 198-199). The Jurisdictional Statement was filed August 29, 1966, and probable jurisdiction was noted December 5, 1966. The jurisdiction of this Court rests on 28 U.S.C. 1253.

Questions Presented

1. Whether the one person, one vote principle applies to the form of government of Suffolk County in New York State, and whether local government problems present substantial and justiciable federal questions when there is a rational justification for challenged state action and state power has not been used to circumvent a federally protected right?

2. Assuming the rationale of one person, one vote applies to local government, are the standards different, and was the procedure adopted below inappropriate?

3. Assuming substantial and justiciable federal questions, is a weighted voting system constitutional?

Constitutional Provisions and Statutes Involved

New York Constitution, Article I, Section 11 (in pertinent part):

No person shall be denied the equal protection of the laws of this state or any subdivision thereof.

Suffolk County Charter (Laws of New York 1958, Chapter 258) Article II, Sections 201 and 203:

§201. The board of supervisors; general powers. The supervisors of the several towns of the county, when lawfully convened, shall constitute the board of supervisors of the county. It shall be the legislative and policy determining body of the county and shall, except as otherwise expressly provided in this charter, have and exercise all the powers and duties of the county together with all the powers and duties which now are, or may hereafter be conferred or imposed on boards of supervisors by all laws applicable to the county not inconsistent with this charter. The board of supervisors shall also have such other powers and duties as are provided by this chapter.

* * *

§203. Voting; quorum. Each supervisor shall have one vote. A majority of the whole number of the members of the board shall constitute a quorum. Except as otherwise provided by law, local laws and resolutions shall be adopted by a vote of not less than a majority of the total membership of the board. In case of a tie vote on any matter at any meeting of the board of supervisors the county executive shall have a casting vote, provided, however, that he shall not have a vote as to any local law or resolution which provides a new form of government, for the county or changes the voting strength of the supervisors, or which changes the location of the county seat.

Local Law No. 4, 1966, Suffolk County, is set forth as part of Appendix B. (App. 16-19)

Statement

This action was brought on July 27, 1962, in the District Court for the Eastern District of New York by the individual appellees (hereinafter sometimes referred to as the Voters), citizens, taxpayers and voters in Suffolk County, New York, on their own behalf and in behalf of all other persons in Suffolk County similarly situated. The action was against ten named individuals, the then supervisors of the ten towns of Suffolk County, in their collective capacity as the Board of Supervisors of the County (R. 2).

The complaint asserted rights under 42 U.S.C. 1983 and 1988, which provide for suits in equity or other proper proceedings to redress deprivations of federal constitutional rights under color of state authority and that state law may be applied by federal district courts in cases involving civil rights if federal law is inadequate to provide a remedy, and claimed that the district court had jurisdiction under 28 U.S.C. 1343(3) and 1343(4) (R. 1).

The ten towns of Suffolk County, each with a legislative body known as the town board, elect, by popular vote, a supervisor every second year. The supervisor is the town treasurer, the chairman of the town board, and his town's representative on the County Board of Supervisors. Pursuant to Section 203 of Chapter 278 of the Laws of 1958, known as the Suffolk County Charter, each supervisor has one vote, notwithstanding the population of the respective towns, which, in 1960, was:

Shelter Island	1,312
East Hampton	8,827
Southold	13,295
Riverhead	14,519
Southampton	26,861
Smithtown	50,347
Brookhaven	109,900
Huntington	126,221
Babylon	142,309
Islip	172,959 (R. 3-5).

The complaint asserts and rests upon the proposition that because of the disparity in town population and the supervisors' single vote there was a resultant "arbitrary impairment of the votes of the [Voters] and of all those similarly situated by means of an invidiously discriminatory geographical classification" depriving them "of liberty and property without due process of law and of the equal protection of laws in violation of the Fourteenth Amendment of the Constitution of the United States" (R. 6).[1]

The complaint requested that the court take jurisdiction, that a statutory three-judge court be convened and grant judgment declaring void in violation of the Fourteenth Amendment so much of Section 203 of the Suffolk County Charter as provides each supervisor shall have one vote on the Board, and other relief (R. 9, 10).

On October 22, 1962, the original defendants moved to dismiss the complaint without assembling a three-

[1] A second cause of action alleging the act of the state legislature was deliberately contrived as a purposeful plan to deprive Voters of their rights (R. 8, 9) was withdrawn (R. 123).

judge court because no substantial federal question was raised, the court lacked jurisdiction over the subject matter, the complaint failed to state a claim upon which relief could be granted, an indispensable party, the state of New York or the legislature thereof, was not joined; it was also urged the court should abstain from exercising its equitable jurisdiction pending an authoritative interpretation of the validity of the Suffolk County Charter by the New York courts, and because of the then recent rejection by the state electorate of a constitutionally provided call for a constitutional convention and the more recent approval by the county electorate of the Charter, such rejection and approval, respectively, having together constituted a political remedy and the exercise thereof (R. 11, 12).

The appellant Board, defendants below, showed from the official records that the voting record simply did not bear out Voters' contentions, and that although the Board was normally all Republican or Republican controlled, in one year, 1961, when it was politically divided evenly, 407 of a total of 505 resolutions were adopted without a negative vote. The close votes had nothing to do with problems arising out of population disparities (R. 13, 14).

Other facts before the district court to assist it in determining the motion included the then (since changed) pertinent provisions of the New York State Constitution (R. 24-29), the County Law (R. 30-40) and the Suffolk County Charter, Chapter 278 of the Laws of 1958 (R. 40-94), which, on a one person, one vote basis, was approved by the electors of Suffolk County on November 4, 1958 by 205,917 to 91,128 (R. 94).

These factors, many of them matters of which the court could take judicial notice were contained in an affidavit of "a resident, taxpayer and voter of the Town of Babylon, and as the supervisor of that town" (R. 96), Arthur M. Cromarty, now a Justice of the Supreme Court of the State of New York.

None of these facts have been controverted by the Voters.[2]

It was shown that there was no impairment of the votes of the residents of the five western more populated towns by the mere disparity in population (R. 96).

Factors advanced against any invidiousness of the discrimination included: (1) the actual voting records, (2) the prime responsibility of the supervisors as town officers, (3) the rationality of state policy, (4) the remedy the people have to amend the state constitution (and that they did not vote to call a constitutional convention as late as one year before the Charter Law was enacted), (5) the recent, 1958, county-wide one person, one vote acceptance of the Charter, and others (R. 96).

One effort on July 23, 1962 to effect a vote weighed to population did not even garner a second (R. 96-100).

This original motion of the Board was denied by Judge Bruchhausen on June 6, 1963 (R. 111, 112); his opinion, dated April 8, 1963, was based on *Baker* v. *Carr*, 369 U.S. 186 (R. 108-111).

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[2] Voters relied on the complaint; see the colloquy, R. 119-122.

The order permitted renewal of the motion and on the convention of the three-judge court the motion was made before that tribunal on the original papers (R. 113, 114).

The three-judge court met to hear the original plaintiffs' application for a temporary injunction and the original defendants' motion to dismiss; the hearing was held September 30, 1963 (R. 115); sixteen months later—on February 1, 1965—the court handed down its opinion (R. 123-136) on the basis of which on March 3, 1965, an order was entered which denied the original plaintiffs' application for an injunction ("without prejudice to renewal in the absence, within a reasonable time, of the political action afforded governmental bodies to be taken as indicated in the Court's decision"); denied the original defendants' motion to dismiss the complaint, and retained jurisdiction (R. 137, 138).

The original opinion of the statutory court considered only the population figures in concluding there was invidious discrimination; acknowledging "first there is the fundamental question of how far * * * the federal judiciary [should] go, or interest itself, in extending *Reynolds* v. *Sims* to local governmental bodies" it suggested this case falls in the middle ground between congressional representative and state legislator elections on the one hand and wards of unequal population in elections for village trustees on the other (R. 126, 127). Without making any clear and definitive statement of law, it left it up to "the agencies of political action" to solve the problem (R. 135), noting that either the state legislature or the Board itself could bring about the change (R. 133).

The application for an injunction having been denied, along with the motion to dismiss the complaint, the original defendants filed their answer on March 22, 1965 (R. 140-142) after having appealed to this Court from the order of the statutory court (R. 138-140).

On October 15, 1965, *sub nom. Griffing et al., constituting Board of Supervisors of Suffolk County, N. Y.* v. *Bianchi, et al.*, this Court granted appellees' motion to dismiss and dismissed the appeal for want of jurisdiction (R. 147).

On December 10, 1965, after creation by the Board of Supervisors of a committee on Reapportionment which later submitted several plans, the Voters moved for various relief, including interim weighted voting (R. 143, 144). The Board cross-moved for an order (1) dismissing the complaint on the ground the court had no jurisdiction, pursuant to this Court's order, (2) dissolving the statutory court, (3) permitting the defendants to file an amended answer and (4) granting summary judgment in favor of the Board (R. 150-151).

On June 15, 1966 the statutory court rendered an opinion (R. 189-198) and on the same date entered an order (1) declaring "Section 203 of the Suffolk County Charter * * * invalid as applied because it is in conflict with the equal protection clause of Section I of the Fourteenth Amendment to the United States Constitution and Sections 1 and 11 of Article I of the New York Constitution, (2) ordering the immediate use of a weighted vote on the Board, (3) directing the Board to submit a plan for reconstitution of the county legislative body (and providing that

upon submission of the plan, required to be prior to July 11, 1966, "the Court will order an immediate hearing to determine whether or not it is reasonably probable that the plan or plans, if adopted, would be found valid"), and (4) retaining jurisdiction.

The Town of Huntington—one of the five western towns fairly characterized as more populated and suburban—had previously been granted permission to intervene[3]; following the weighted vote order, all five of the eastern (less populated and more rural) towns, and their supervisors, individually, moved to intervene as defendants (R. 200) and were granted permission to do so.

The eastern towns filed their answer (R. 213-215); the Board and those towns on June 30, 1966 filed separate notices of appeal to this Court (R. 216-223) from the statutory court's order.

There was a supplemental opinion and order of the statutory court, passing upon the constitutionality of voting plans (App. D). Acting under the court-ordered weighted voting, the Board adopted a local law amending the Suffolk County Charter making a weighted voting scheme the permanent plan (App. B). Pertinent material has been certified and transmitted to this Court and counsel have stipulated reference to unprinted portions of the certified record may be made in the briefs and on oral argument.

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[3] As plaintiff. This permission was granted from the bench at one of the hearings the transcripts of which are not made a part of the record. See docket entry of district court.

Summary of History and Present Political Structure of Suffolk County

(History extracted from Appendix A infra)

The Towns of Suffolk County are "New England Towns". Southold was settled as early as 1637 and was in operation as a town in 1640 under the colony of New Haven, Connecticut, and originally included the Towns of Shelter Island and Riverhead; Shelter Island was formed in 1730 and Riverhead in 1792. Southampton was settled as a town in 1640; East Hampton as a town in 1648; Brookhaven was settled in 1655 and Smithtown became a town in 1683. Huntington dates from 1646 and included Babylon until the year 1872. Islip did not appear as a town until 1710.

In the name of the Duke of York, a convention of town deputies was called in 1665. They enacted the Duke's Laws. The area from Brooklyn to Montauk and including Westchester was termed Yorkshire and divided into ridings, the precursor of counties. The Towns of Suffolk County, maintaining their status, were known as the east riding.

The County of Suffolk was first formed in the year 1683. The History of the County Law of New York,[4] page xxvii, indicates that Chapter 131 of the Laws of 1703 provided for the election of a supervisor at the annual town meeting for the sole purpose of representing the town on the Board of Supervisors.[5]

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[4] Introduction to New York County Law, 11 McKinney's Consolidated Laws of New York Annotated. See, generally, that entire article and Moore, History of Town Law, Introduction to New York Town Law, 61 McKinney's Consolidated Laws of New York Annotated.

[5] Our research ould indicate it was actually Chapter 133 of the (Colonial Assembly) Laws of 1703.

Section XXXV of the Constitution of 1777 provided in part,

> "that such parts of the Common Law of England and of the Statute Law of England and Great Britain, and of the acts of the Legislature of the colony of New York, as together did form the law of the said colony on the 19th day of April in the year of our Lord 1775, shall be and continue the law of this state." *Beers* v. *Hotchkiss,* 256 N.Y. 41, 53 175 N.E. 506.

This provision as to the colonial laws of New York of the New York State Constitution has continued to this day, Article 1, Section 14.

The present governmental responsibility within the boundaries of the County of Suffolk is complicated. There are still ten townships, but also numerous incorporated villages, school districts, fire districts, planning boards, water authorities, sewer agencies, police districts, court districts. Each municipal corporation has its officers ranging from fire commissioner in a fire district to the county executive in the county. There are county officers such as the executive, clerk, treasurer, district attorney, sheriff and comptroller [County Law §400; Suffolk County Charter §§301, 501, 1401, 1601, 1701, 1801, (R. 41 et seq.)], who run for their county-wide office where each qualified county inhabitant has one vote and one voice.[5a] Certain state powers are delegated directly to these office holders and other minor sub-governments. The towns and counties have little to do with education since the school districts are the responsible

[5a] The county executive casts a deciding vote on the Board of Supervisors when there is a tie (R. 45).

body[6] (Education Laws, §§1604, 1709, 1804), acting within the administration of the Board of Regents and Commissioner of Education (Education Law, §201, 301). A residuum of state power is conferred on the county which is still a confederation of townships. It is the same type of confederation that existed when the "rural" towns had greater population and gave an equal vote to the ten sparsely populated now "urban" towns.

This "crazy quilt" form of government is the result of political evolution. This Court may find that it has a great deal of "play in its joints" (*Reynolds* v. *Sims*, footnote 57).[7] Political scholars may rebel at its organizational scheme, but the Legislature of the State of New York and the people of Suffolk County have grown accustomed to its mood.

The County government of Suffolk does not pretend to be truly representational of all the people. It is representational of each of ten towns which have banded together to provide for those services each does not wish to perform alone. The Supervisors are and have been town officials and do not run on a county-wide basis. There is nothing intrinsically evil in a state providing for the exercise of authority by ten town supervisors. Indeed, the Legislature of the State of New York has provided for different forms of county government such as: County Administrator, County Manager, County Director or County President; and codified these systems

[6] School board members may be elected or appointed without constitutional significance (*Cohen* v. *State of New York*, 52 Misc. 2d 324).

[7] 377 U.S. at 577.

under the Alternate County Government law[8]. In addition to alternate or charter amendments, the voters of a town feeling themselves aggrieved can exercise the historical and continuing remedy of petitioning to form a new county[9].

Summary of Argument

Suffolk County, a municipal corporation in New York State, is possessed of certain limited governmental powers delegated to it by the state and not in conflict with the larger powers delegated by the state to the ten towns within the county. Presently, the County Board of Supervisors is composed of ten persons, each of whom is elected as a supervisor of one of the ten towns. The town supervisors are elected at large by the town electorate and each primarily acts as a member of the town board and secondarily, as a delegate to the county board. Solely by virtue of his office as a town supervisor, the person elected to that office sits as a member of the county body, the Board of Supervisors, and casts one vote. The population extremes of the ten towns are 1,312 to 172,959.

Solely on the basis of the population disparity, the complaint asks that the pertinent section of the Suffolk County Charter, a state statute applicable only to Suffolk County, approved by the voters of Suffolk in a referendum and perpetuating the historical concept of county government as an amalgam of ten equal towns, be declared unconstitutional and in violation

[8] 3A McKinney's Consolidated Laws of New York Annotated.

[9] See, New York Constitution, Art. 3, Sec. 5; L. 1899 ch. 588, creating Nassau County.

of the Equal Protection Clause of the Fourteenth Amendment.

We submit the reach and scope of the Equal Protection Clause of the Fourteenth Amendment, set in juxtaposition to section 4 of Article IV, does not dictate a democratic representational form of local government, or any other particular political structure. It is argued that the selection of supervisors based upon 255 years of historical precedent, clothed with authority delegated by a state legislature to enact or administer laws relating solely to the property, affairs and government of a county in New York State, is of local concern; and such supervisors need not be selected solely by population but can be delegates from towns otherwise constitutionally elected within such towns.

We admit that if they become state legislators by virtue of their office, the law so directing would be void as violating the Equal Protection Clause of the Fourteenth Amendment, on the authority of *Reynolds* v. *Sims,* 377 U. S. 533, and the other June 15, 1964 reapportionment (of state legislatures) cases.

But we maintain that this court has never determined, and should not now decide, that because supervisors of a town—a form of sub-state government—become ex officio members of the county board—another form of sub-state government—the law so providing is unconstitutional on any ground state or federal. Whether termed as failure of subject matter jurisdiction, the impropriety of equitable discretion or the existence of a rational justification for the form

of Suffolk County government, the judgments below should be reversed.

Assuming the Court wishes to partake in local government control, we believe that different standards than enunciated in *Reynolds, supra,* would properly apply to sub-state governmental structures, validating Suffolk County's Council of Towns concept.

Lastly, we believe that a reversal herein is required because the judgment below was summarily granted upon the false premise that mere disparity in population was decisive, and imposed an impermissible system of weighted voting, which has resulted in the adoption of a permanent but unconstitutional change in the form of local government in Suffolk County.

I

The District Court had no jurisdiction over this action.

This Court previously considered an appeal in this matter and held "The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction." *Griffing* v. *Bianchi*, 382 U.S. 15. The court below had observed and asked: "Defendants by their motion to dismiss raise the question of the power of a three-judge federal court to act in the premises. Assuming justiciability, is this provision of the Suffolk charter of such state-wide interest as to be within the jurisdiction of such a court? Relatedly, is a substantial federal question now presented?" (R. 128)

A. The claim of unconstitutionality based upon the disparity of population in the structure of local government presents the issue of political form of local government which is outside Federal jurisdiction.

The precise holding of *Baker* v. *Carr,* 369 U.S. 188, is that the Equal Protection Clause prevents the State of Tennessee from diluting a vote of a qualified voter where the standard set by the State of Tennessee for electing its representatives is based upon the number of qualified voters. There was nothing in that decision which mandated the State of Tennessee to adopt any particular form of representative government. In fact, the Court particularly noted that the holding was not based upon any theory of implementing the Guaranty Clause of the Constitution, for cases thereunder were repeatedly held nonjusticiable, Congress being the sole arbiter of what is in fact, a republican government. *Baker,* therefore, did not break the continuing chain of authority precluding judicial interference with the form of local political governments. *Gray* v. *Sanders,* 372 U.S. 368, following the wake of *Baker* was based on the premise that "Georgia gives every qualified voter one vote in a state-wide election", 372 U.S. at 379, and was "only a voting case", 372 U.S. at 378. Again, the form of government was prescribed by Georgia and the Equal Protection Clause prevented the adulteration of that system by diluting the vote. The real meaning of all the "one man—one vote" cases is expressed by Mr. Justice Black in *Fortson* v. *Morris* (No. 800 decided this Term December 12, 1966) — U.S. —, 17 L. ed. 2d 330, where in speaking for the majority of this court and commenting on *Gray* v. *Sanders* he stated:

"* * * This case, as was emphasized, had to do with the equal right of 'all who participate in the election', 372 US, at 379, 9 L ed 2d at 829, to vote and have their votes counted without impairment or dilution. But as the Court said, 372 US, at 378, 9 L ed 2d at 829, the case was 'only a voting case'. Not a word in the Court's opinion indicated that it was intended to compel a State to elect its governors or any other state officers or agents through elections of the people rather than through selections by appointment or elections by the State Assembly. It is wrongly cited as having either expressly or impliedly decided that a State cannot, if it wishes, permit its legislative body to elect its Governor."

"* * * There is no provision of the United States Constitution or any of its amendments which either expressly or impliedly dictates the method a State must use to select its Governor. * * *"

There is nothing, then, in the Federal Constitution that requires a State to create, recognize, or protect a particular *form* or any *form* of local self-government. There is no clause in the Constitution guaranteeing municipal home rule. This is not a voting case, nor is it a discrimination or civil rights case. This is a cause based upon the litigants dislike over the *form* of government in Suffolk County. Each town, not each individual, in Suffolk County has a vote in county affairs cast by each town supervisor. Equal rights attach only to those who participate in an election. There is no county-wide election for the Board of Supervisors in Suffolk County. The Board is composed of town supervisors just as it might be town

clerks. A resident of the Town of Huntington is not supposed to participate in the election of the delegate from the Town of Southampton.

Baker v. *Carr* distinguished the early case dismissals over questions of jurisdiction or justiciability because it expanded the concept of equal protection to voting cases. The decision, nevertheless, conceded that:

> "* * * Dismissal of the complaint upon the ground of lack of jurisdiction of the subject matter would, therefore, be justified only if that claim were 'so attentuated and unsubstantial as to be absolutely devoid of merit,' Newburyport Water Co. v. Newburyport, 193 US 561, 579, 48 L ed 795, 801, 24 S.Ct. 553, or 'frivolous' Bell v. Hood, 327 US 678, 683, 90 L ed 939, 943, 66 S.Ct. 773, 13 ALR 2d 383. That the claim is unsubstantial must be 'very plain'. Hart v. B. F. Keith Vaudeville Exch., 262 US 271, 274, 67 L ed 977, 979, 43 S.Ct. 540."

It is unnecessary here to resort to any fictionalized distinction of authorities into justiciability or subject matter jurisdiction, but if jurisdiction be a touchstone for dismissal, we submit it would be unsubstantial and frivolous to hold that a citizen has a constitutional right to any particular form of local government. Once such jurisdiction obtained, the people in New York State could be required to have the same form of local government as a parish in Louisiana or an outpost in Alaska, such form to be established by the Courts, not the citizenry.

There is no judicially enforceable right to a particular republican form of State government. There is no judicially enforceable right to the form of selecting a governor. There can be no constitutional right to a particular *form* of county government and, therefore, jurisdiction is lacking here.

B. The delegation of power by a State to a substate government being nonjusticiable and there being a rational justification for the challenged state action, and in the absence of state power having been used to circumvent a federally protected right, the complaint does not state a justiciable cause of action.

In *Baker,* the Court reviews the Guaranty Clause cases and shows that the Court treats as nonjusticiable cases involving delegation by the states of its authority to substate governments or agencies. *Pacific States Tel. & Tel. Co.* v. *Oregon,* 223 U.S. 118; *Mountain Timber Co.* v. *Washington,* 243 U.S. 219; *Kiernan* v. *Portland,* 223 U.S. 151; *O'Neill* v. *Leamer,* 239 U.S. 244; *Highland Farms Dairy* v. *Agnew,* 300 U.S. 608.

Hence, we assume that even since *Baker* the Court will not treat as justiciable whether the State may delegate to Suffolk County the power to tax, the power to spend tax revenues, the power to administer welfare assistance, the power to condemn and like powers.

The Voters claim, however, that the State and the people of the County may not determine that the persons who shall exercise those county powers shall be selected from other affected municipal corporations —the towns. Voters eschew Article IV, section 4 under

which the question is nonjusticiable and aver equal protection as a basis of justiciability.

We maintain that the attack here under the guise of the Equal Protection Clause is but a cloak for an attack "on the State as a State", just as it was determined to be in *Pacific States Tel. & Tel. Company* v. *Oregon*, 223 U.S. 118, 150, 151, *supra; Baker* v. *Carr*, 369 U.S. 186, 227, 228.

There is no claim here, nor can there be in view of the combined state and people-of-the-county action, of discrimination by state political action "cloaked in the garb of the realignment of political subdivisions", *Gomillion* v. *Lightfoot*, 364 U.S. at 345.

Tedesco v. *Board of Supervisors*, 43 So. 2d 514, dismissed "for want of a substantial federal question", 339 U.S. 940, was explained in *Baker* to have been nonjusticiable since ". . . it was urged that there was a rational justification of the challenged districting" of city council seats, 369 U.S. at 235.

We strongly urge to this Court that when the Charter was adopted there was (a) no realignment of political subdivisions and (b) a most rational justification for the challenged districting (which definitely was not to give representation to "certain groups, social or otherwise") existed. 43 So. 2d at 519.

A careful study will show conclusively that the New York State Constitution is itself the reason for town supervisors sitting on county boards and that the present situation prevailed when colonial New York became one of the United States and as early as 1703 in colonial New York (see HISTORY AND

POLITICAL STRUCTURE OF SUFFOLK COUNTY, *supra* p. 8) and Appendix A; see also New York State Constitution, Article I, section 14; *Beers* v. *Hotchkiss*, 256 N.Y. 41, 53, 175 N.E. 506, *supra*.

The federally protected constitutional rights that a voter in Suffolk County in New York State has are that in voting for anything for which he is qualified to exercise his franchise he is entitled not to be discriminated against because of his race, religion (or lack of it), color, creed, sex, previous condition of servitude or country of national origin; in voting for congressional representatives he is entitled to cast his vote in a district with the same (so far as it is practicable) population as any other district in the state;[10] and in voting for state legislators he is entitled to the coverage of the Equal Protection Clause since every state is guaranteed a republican form of government.

When the state merely delegates governmental power limited to the less than state-wide area of the local government, since there is no constitutional requirement as to the form of that municipality, the governmental action can be taken by whomever—and however—the state may provide.

There has been no state action inconsistent with the federal constitution. No federally protected voter right has been circumvented by any state action. There was a 255 year historical precedent for continuing the town supervisors as the county board under the 1958 charter. No substantial federal question can be found in the circumstances here present.

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[10] Or, indeed, in any of the 50 states.

II

Local government structure is not an appropriate sphere for the Federal courts to exercise their equitable discretion.

There is a vast difference between the election of congressmen from and legislators for fifty states on the one hand and the nearly 40,000 sub-state units with legislative powers (of nearly 100,000 governmental units exercising state-delegated powers—as determined by a 1962 census of governments) on the other.[11] We purposefully refrain from any discussion of the effect of *Reynolds* on that most common form of governmental unit, the more than 34,000 school boards, most of them popularly elected, by reason of the Court's order setting this case down with, among other, *Sailors* v. *Board of Education of the County of Kent,* No. 430, this term.

We inquire: how is sub-state equality to be determined, by inhabitants, residents, citizens, or voters? While practical differences may not be significant on the state level, on the municipal level such factors as a military base, an Indian reservation, a research site staffed with transient government workers, and mental hospitals, with large percentages of inhabitants not otherwise indigenous to the locality, may be very significant.

Interestingly enough, Suffolk County has, for example, the Suffolk County Air Force Base, the

[11] U.S. Dept. of Commerce, Bureau of the Census, 1965 Statistical Abstract of the United States, 419.

Poospatuck and Shinnecock Indian Reservations, Brookhaven National Laboratory, the Plum Island Animal Disease Laboratory, and several mental hospitals, including Pilgrim State Hospital, probably the largest in the world, which have a patient population greater than half that of the total population of the five eastern towns![12]

Moreover, the reapportionment cases have highlighted the fact that population is not static. In small geographical areas where census figures can read in three, four or five figures, small population shifts could require semi-annual head counts to prevent the dilution of statistically reliable representation. This is particularly true at the local level where major governmental concerns and problems arise from the very shifts in population.

Since gross population disparity, the thrust of the complaint here, is intrinsically a poor local governing standard, when one considers the court below has permitted the hospitalized mentally ill in Suffolk County to outvote half the five supervisors representing approximately 60,000 presumably sane people, 344 square miles including many political subdivisions, and one-fifth of the county's assessed value, we must consider the judicial quandary over pragmatic standards (R. 19).

Philosophically, a discussion of standards assumes a basic tradition or set of values. But as previously demonstrated on the county government level in New York, pure representational democracy was never the

[12] U.S. Census, 1960, Suffolk County tracts IS 63, SM 48, IS 55, HU 7.

tradition. While there is a continuing dialogue for municipal reform it is an intrastate political infight which should not be danced to the tunes from the *Baker* bandwagon. Courts are not representative bodies nor are they theoretical political workshops. The professors of political science have their own journals of discourse.[13]

The arguments over standards which split this Court in the reapportionment cases are, *a fortiori*, more compelling in local government where the basic historical premise of democratic republicanism is a mere yearning.[14]

Further, there is the inherent qualitative standards problem of determining how much State sovereignty a particular local government may possess; and whether it is exercised for a special, specific, or limited purpose. That is, where the governmental power may be limited to one or more of the following: school children, roads, sewers, internal sub-govern-

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[13] In the previous one year bound volumes of two periodical indices: Bulletin of Public Affairs Information Service, and Social Sciences and Humanitarian Index, over 75 articles can be found under the topic "apportionment". These include weird mathematical inventions interpolating the differing judicial opinions from this court into modern mathematical formulae. It is incalculable what such political commentators will unleash upon the very complicated sub-state governmental structures which contain such interesting variables.

[14] It should be noted that a political study has revealed there really is no significant relationship between apportionment of political structures and policy outcomes. There also seems to be no relationship between apportionment and responsible competition between political parties. Richard I. Hoffernbert: The Relation Between Public Policy and Some Structural and Environmental Variables in the American States. Vol. LX No. 1, American Political Science Review, p. 73.

ments, lower court judicial districts, a vote or voice in the body making the policy determination rests upon special considerations more than numbers, a recognition of this concept being the local special assessment levy versus the ad valorem.

In Suffolk County we have a district court system where judges are elected from the individual five western towns but sit in a district which composes half the county and exercises county-wide jurisdiction; a unique result from a problem of overcrowding court calendars in the western towns justice-of-the-peace courts. Does the Supreme Court of the United States wish to unravel these continuing local legislative compromises?

We also note the current vogue of bi-county planning boards and a more rational coordination of suburban services by super-regional metropolitan governments. Are such modern governmental trends to be discouraged because Suffolk County or Nassau County would have unequal voices with Queens or Westchester County?

The state statute under attack here is the Suffolk County Charter. It applies only to one locality. In such a case the convention of a three-judge court is unwarranted. *Rorick* v. *Board of Commissioners,* 307 U. S. 208, (1939). The statute, 28 U.S.C. Section 228, provides the equity power of a federal district court to enjoin state officials from acting under the authority of unconstitutional state statutes may be exercised only by a three-judge court. The complaint alleges the supervisors perform state functions, but no state

official was made a party defendant. Notwithstanding this, the District Court refused to dismiss and retained jurisdiction, observing dismissal "will serve no useful purpose; the defect, if such is remediable". (R. 134; 238 F.Supp. 997 at 1004.)

III

The Fourteenth Amendment is not violated because the legislative representation on the Suffolk County Board of Supervisors does not meet apportionment standards which apply to state legislatures.

On the basic question whether the Equal Protection Clause mandates the application of the one person, one vote principle at sub-state levels of government both state and federal courts are divided. Some of the cases have been discussed in the Jurisdictional Statements and motions filed in this and companion cases.[15]

We do not here propose to discuss each of the several pertinent cases. Rather, we show some common errors and weaknesses in the line of cases which hold the one person, one vote principle is applicable to local government.

The political result of this Court's reapportionment decisions is authoritatively documented and too well known generally to require restatement here.

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[15] *Sailors, et al.* v. *Bd. of Education of the County of Kent, et al,* No. 430; *Moody, et al.* v. *Flowers, et al,* No. 624; *Dusch, et al* v. *Davis, et al,* No. 724.

Many people, some gleefully, others unhappily, just assumed these cases applied to municipalities.

The first court decision announcing this view was *Brower* v. *Bronkema,* No. 1855 Kent County, Michigan Circuit Court, September 11, 1964, reprinted in 13 National Municipal League, Court Decisions on Reappportionment 81 (1965); affirmed 377 Mich. 616, 141 N.W. 2d 98 (1966).

The error in *Brower* was two-fold: first, it incorrectly asserted that *Reynolds* had announced a new "federally protected right" that the state could not deny to the citizens of its subordinate units—equal apportionment.[16]

Secondly, it based its decision on the following chain of argument:

1. The Fourteenth Amendment applies to every state and to every governmental agency or instrumentality of the state which exercises powers delegated to it by the state.

2. The county is a governmental instrumentality or division of the state and the board of supervisors is the legislative body of the county. That board exercises legislative powers delegated to it by the state.

3. The state may exercise its legislative powers only in a legislative body apportioned on a population basis and if it delegates a part of these powers, it must

[16] Quite, and most importantly, overlooking the Tenth Amendment of the federal constitution: powers reserved to the States and the people.

do so to a legislative body apportioned to the same basic constitutional standard.

The difficulty in the syllogism is that proposition 3 does not logically follow from propositions 1 and 2. Unfortunately, altogether without critical analysis, this line of reasoning has been swallowed by many other courts.

In New York state the first case to reach its Court of Appeals was *Seaman* v. *Fedourich,* 16 N.Y. 2d 94, 262 N.Y.S. 2d 444, 209 N.E. 2d 778, and it is rife with error, possibly because even the defendants there assumed with the plaintiffs and the Court that *Reynolds* applied, word for word.

It was there said:

> "The present action was, of course, prompted by recent Supreme Court cases holding that the equal protection clause of the Fourteenth Amendment requires that representation in both houses of a state's legislature be substantially proportionate to the number of people represented under the principle of 'one person, one vote' [citing in a footnote *Reynolds* and the five other June 15, 1964, decisions of this Court]. There can be little doubt, *and it is not disputed by the defendants,* that the principle is applicable to elective legislative bodies exercising general governmental powers at the municipal level (of *Reynolds* v. *Sims,* 377 U.S. 533, 575; *Gomillion* v. *Lightfoot,* 364 U.S. 339 and such has been the conclusion reached by several courts called upon to consider the question." (Emphasis supplied)

After citing a host of now familiar cases in a footnote, the opinion continued:

> "It is axiomatic that local governmental units are creations of, and exercise only those powers delegated to them by, the State (N.Y. Const., Art. IX, §§1, 2; Municipal Home Rule Law, §§10, 11) and, certainly, if the latter may exercise its legislative powers only in a body constituted on a population basis, any general elective municipal organ to which it delegates certain of its powers, must, by a parity of reasoning, be subjected to the same constitutional requirement. Viewed in another way, if, as seems evident, the thrust of the Supreme Court's decisions is that it is inherent within the concept of 'equal protection' that a person has a substantial right to be heard and to participate, through his elected representatives, in the business of government on an equal basis with all other individuals, no reason or justification exists for differentiating, so far as that right is concerned, between the general governmental business carried on in the highest legislative organs of the State and that conducted, by virtue of a delegation of authority, in municipal lawmaking bodies. See, generally, Weinstein. The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government, 65 Col. L. Rev. 21." (16 N.Y. 2d at 101-102).

It is as though the New York State Court of Appeals, along with others, was somehow hypnotized by *Baker* and *Reynolds* and *Lucas* into believing something those cases never said. Of course, we do not know what these cases meant, with reference to the

sub-state problem, but they certainly did not say what is attributed to them "as by a parity of reasoning."

It is regrettable that this first New York case to reach its highest court was not a genuine adversary proceeding, rather than an "okay, we're licked; just give us forgiveness for this little sin" sort of proceeding.

But the New York Court of Appeals has, even more than some other courts and most commentators, ignored completely the right of the state to govern locally by administrative procedures rather than by elected local legislators; completely overlooked signals in this Court's decisions that indicated, if indeed, equal protection means equal apportionment, at least *less* strict standards could properly govern municipalities; and fallen into some sophomoric logic.

That Court referred to the much cited article by Professor (now District Court Judge nominee) Jack B. Weinstein: *The Effect of the Reapportionment Decisions on Counties and Other Forms of Municipal Government,* 65 Col. L. Rev. 21. The second sentence reads: "There is every indication that the *Reynolds* rule applies to county boards of supervisors, the bodies that usually exercise all of a county's legislative, and, in many instances, much of its executive power, as well as to general purpose units of local government such as villages, town, cities, and boroughs." One who drops his eyes to the footnote following the sentence anticipating a wealth of judicial support for this profound statement is met with reference to New York definitions of "local government." The "every indica-

tion" exists, apparently, in the wishes of those who might benefit from that development.

We note that every one of the references to apportionment in *Reynolds* was qualified with "state legislative," "congressional" or some similar adjective(s). Rather than "every indication" *Reynolds* applies to county government, we note strong indication it does not in its reference to *Hunter*.

> "Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in *Hunter* v. *City of Pittsburg*, 207 U.S. 161, 178, 28 S. Ct. 40, 42 L. Ed. 151, these governmental units are 'created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them' and the '*number, nature, and duration of the powers conferred upon* [*them*] * * * *and the territory over which they shall be exercised rests in the absolute discretion of the state.*'" *Reynolds* v. *Sims*, 377 U.S. at 575. (Emphasis supplied)

To be sure, that argument was employed to show that the "relationship of the States to the Federal Government could barely be less analogous," and that there was no justification for a two-house state legislature, and the representation of one of which had no relation to population.

But the *Hunter* case did not employ the quoted language to prove the inaptness of the federal analogy. And that the nature of local government rests in the absolute discretion of the state is certainly true, provided only, we must qualify, that no federally protected right is violated.

In *Fortson* v. *Morris,* this Court held:

> "There is no provision in the United States Constitution or any of its amendments which either expressly or impliedly dictates the method a State must use to select its Governor." — U.S. —, 17 L. Ed. 2d at 333, No. 800 this Term, decided December 12, 1966.

Just as correctly it may be said there is likewise nothing in the Constitution or the Fourteenth Amendment which dictates how New York shall take care of the particular local matters for which it created Suffolk county.

Just as the Georgia legislature could elect (i.e., appoint) its Governor, so New York could appoint to run Suffolk county the supervisors of the ten towns in it. We do not by this argument rescind the Fourteenth Amendment, or lose it somewhere in outer space.

If the Georgia constitution provided the governor the legislature was to elect might not or must be a white Protestant Anglo-Saxon, no one would profess that constitution did not conflict with the United States Constitution and must therefore fall. And if New York state said that only those citizens of its towns who had visited Washington, D.C., could vote for the town supervisors no one would gainsay the

right of any court possessed of jurisdiction to strike down the offending provision.

New York State, the author and finisher of counties, simply directs the town supervisors to take care in Suffolk county of such local problems as the state mandates are properly to be taken care of at that particular level of local government. In the course of so doing the New York Legislature provides these supervisors may legislate in a very limited area.

There is nothing unique or peculiar about Suffolk county in this scheme of government. The New York Legislature has passed many laws delegating to department heads or commissions, who are appointed by the Governor, the right to make rules and regulations having the force and effect of law. The Civil Service Commission, many public authorities and the Commissioners of Labor, Education, Health, and Agriculture and Markets are examples.[17]

No one questions this right, notwithstanding that some legislate state-wide (Labor, Health, for instance) and some only locally (as the Long Island State Park Commission), for the reason that the ones who appoint, whether it be the Legislature or the Governor, or both, are elected on a one person, one vote basis.

New York state, by compact[18] with New Jersey, approved by Congress by Res. August 19, 1937, c. 706, 50 Stat. 719, has delegated some of its legislative

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[17] See; New York Civil Service Law, Labor Law, Health Law, Education Law, Agricultural and Markets Law, Executive Law §102.

[18] Authorized by Laws of New York 1937, Ch. 170.

powers to a body politic and corporate known as the Palisades Interstate Park Commission. This Commission makes rules and regulations having the force and effect of law as to certain parts of New York state and one-half of its members are New Jersey residents who are members by virtue of appointment by the Governor of New Jersey with the approval of its Senate.[19]

The well known Port of New York Authority is a similar body with similar powers.[20]

It should be noted, and stressed, that even the interstate bodies legislate only in their own limited jurisdictions. The New York Legislature has never delegated to a local government or district corporation the power to make laws of state-wide application.

Actually, the counties in New York have very little real legislative power. They pass a lot of administrative resolutions having to do with maintaining county roads and buildings and the like. They are essentially caretakers as to the property, affairs, and government of the area of their jurisdiction to the limited extent of their powers. Towns can actually zone property; counties can only plan. Towns can legislate as to parking on county roads; counties cannot.

The towns, cities, and villages are the repository of most of the delegated powers affecting the health,

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[19] New York Conservation Law, §§745-762 (Palisades Interstate Park Commission).

[20] New York Unconsolidated Laws, §6771 et seq. (Port of New York Authority).

safety, welfare, and morals of the people. They can, and do, pass penal laws.

Suffolk county has been a council of towns from colonial days and so remains to this day, with constitutional sanction.[21]

There is, without a doubt, considerable talk among political theorists about more centralized sub-state and interstate government. "Metros,"—some even embracing parts of several states, such as one extending from Boston to Washington, D.C., and even beyond—such as the regional government presently operative in Toronto, Canada, and Dade County, Florida, are discussed and planned, mostly on paper. Political realists, however, while recognizing that technological and sociological changes will require change in the functions of local governments, know that the changes will be characterized by more deliberation than speed.

We are concerned with things as they are; indeed, as they were when this action was commenced.

If the decisions, holding local governments with legislative powers must be structured on *Reynolds* principles, are examined in the light of the admonishment in *Baker* that there are well established standards under the Equal Protection Clause for fashioning proper remedies at the district court level, and if we honestly consider how vastly unequal things can be as that clause is interpreted, it is difficult to effect logical reconciliations.

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[21] New York Constitution, Article I, §14.

Our position is that the principle is not applicable to the Suffolk County Board of Supervisors, and, even if it is, a reversal is required in this case, since there is a rational, constitutionally-sanctioned justification for the system in being.

IV

Section 203 of the Suffolk County Charter is not in violation of the Equal Protection Clause in the New York State Constitution.

Most surprisingly, quite out of nowhere, the District Court in its order of June 15, 1966, declared that Section 203 of the Suffolk County Charter violated sections 1 and 11 of Article I of the New York State Constitution (R. 199). This was never pleaded by the appellees; it was never argued or briefed by any of the parties and where it comes from is only a surmise. The surmise is that it comes from some rather loose language of the New York Court of Appeals in *Seaman* v. *Fedourich,* 16 N.Y. 2d 94, 102, 209 N.E. 2d 778.

As has been earlier indicated, *Seaman* v. *Fedourich,* supra, was not truly an adversary proceeding. The decision was predicated on the applicability of the federal constitution and it was, therefore, unnecessary for the Court to invalidate the Binghamton City Council under the Constitution of the State of New York. The Court's reference therein to the State Constitution is necessarily dicta and, in fact, the decision really holds that the State Constitution is vio-

lated because of the prophecy that *Reynolds, et al.* applies to municipal government. There was no mention whatsoever of section 1 of Article I.

Section 11 of Article I of the New York State Constitution starts with this sentence

> "No person shall be denied the equal protection of the laws of this state or any subdivision thereof."

This constitutional provision was first placed in the Constitution in 1938. At the same time there was also *re-enacted* as proposed by the same constitutional convention, Sections 2 and 3 of Article IX. Section 2 of Article IX provided for the alternative form of government for counties, and Section 3 provided that the existing laws

> "applicable to the government of counties . . . and other units of government therein contained shall continue in force until repealed."

We must keep in mind, all during this discussion, that Section 14 of Article I of the New York Constitution has remained in substantially the same form since the Constitution of 1777, supra, p. 9, which continued the acts of the colonial legislature in creating the supervisors as the town representatives to the county board until altered by the Legislature.

In 1957, a concerted effort was made to liberalize the home rule authorities of the towns and counties of the State of New York and, after elaborate and voluminous reports of legislative committees, there was created a proposed amendment to Article IX pertaining to

local governments, and new Sections 1, 2 and 3 were adopted by the People of the State on November 4, 1958, after having been passed the second time by the Legislature of 1958.

Section 3 of Article IX passed in 1958, was identical with Section 3 passed in 1938. At the same session of the Legislature in 1958, the Suffolk County Charter was enacted and was signed by the Governor on March 21st. It was later approved by the voters of Suffolk County in the Fall of 1958, on the same election day as that which ratified and approved the amendments to the State Constitution in relation to home rule and county government.

All the while, Section 11 of Article I remained in full force and effect, but it must be read in conjunction with the other parts of the Constitution of the State of New York. It is idle to say that when the Legislature passed the law stating "each supervisor shall have one vote", and stating that existing laws, applicable to the government of the counties, shall continue in full force until repealed, and when the people of Suffolk County ratified the charter, and the people of the State adopted the constitution on the same day, that neither the Legislature nor the people knew what they were doing.

Furthermore, another complete revision of Article IX of the New York State Constitution was proposed in the year 1962, passed the second time by the Legislature in the Spring of 1963, and adopted by the voters in November, 1963, and in effect on January 1, 1964. On this amendment, subdivision (b) of Section 3 prescribed as follows:

"(b) The provisions of this article shall not affect any existing valid provisions of acts of the legislature or of local legislation and such provisions shall continue in force until repealed, amended, *modified or superseded in accordance with the provisions of this constitution.*" (emphasis supplied)

It is axiomatic that: the Constitution of New York must be construed as an entire instrument; that construction should be adopted which will render every provision operative rather than one which will make some idle and nugatory, and the provisions of the constitution will be presumed to have been adopted with reference to, and to imply a knowledge of, existing laws, *People* v. *Mosher,* 45 App. Div. 68, 61 N.Y.S. 452; aff'd. 163 N.Y. 32, 57 N.E. 88.[22]

If the Fourteenth Amendment of the federal constitution invalidates section 3 of Article 9 of the New York State Constitution, that is one thing; it is an entirely different thing to say that in 1938 the addition of section 11 of Article I to the New York Constitution *eo instanti* invalidated section 3 of Article IX which was renumbered and amended from Article III, section 26(7) of the State Constitution of 1894.

The two sections must stand together until the State Constitution is expressly amended to the contrary.

We submit that the foregoing demonstrates that the New York Constitution is not violated by Section

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[22] See generally, Rules of and Aids to Interpretation, vol. 2 Bk. 1, McKinney's New York State Constitution pp. 10, 11, 18, 19.

203, Suffolk County Charter and that until a truly adversary proceeding on the issue reaches the Court of Appeals, no state precedent exists upon which the District Court or appellees can rely.

V

Assuming a justiciable controversy, the procedure below was inadequate.

This case was sparked from the charge of *Baker* v. *Carr*. It languished in a vacuum of authorities and ripened for judgment in a maze of judicial conflicts. Hindsight suggests why the procedure adapted in this litigation was informal, and also reveals that it was not adaptable to resolve any issues other than the prognostication by the district court of the Supreme Court's view on local government.

The judgment imposed on the people of Suffolk County, New York, forcing a change in the structure of their political government can rest only on one basis: the Supreme Court of the United States will decree that all local forms of government with disparity of population must be altered or abolished.

Judgment here was rendered summarily (R. 198), without testimony, and on one theory of action based solely on population numbers (R. 115-123). Although the court observed in its decisions of February 1, 1965, June 15, 1966 and August 4, 1966, the other factors and standards which were by then gaining some judicial favor, the appellees were pinned to the corners of this lawsuit which began and ended on the admission of population disparity. While the court implored the County Supervisors to initiate a home rule

change and theorized about differing local governments, it channelled political action into the acceptance of a weighted elective system based upon the pseudo constitutional premise that any and all government at the County level requires a headcount. In this haste, it brushed aside several local plans espoused by a committee on reapportionment and characterized an at-large elective plan of representation as "probably, if marginally, constitutional".[22a] The court below became absolute judicial activists in local government, while the marionette weighted Board of Supervisors it created molded the county government in the court's image of politics. If there is any standard or factor which may be considered in effecting a municipal structure below the state level other than population disparity, the people of Suffolk County have not received their day in court or at the polls.

VI

Assuming a council of towns is not constitutionally permissible, the interim and permanent plans of weighted voting are not constitutional.

On June 15, 1962, 15 scholars met under the aegis of the Twentieth Century Fund. In substance, their statement of basic principles, *"One Man—One Vote"* was made the law of the land on June 15, 1964.

On June 15, 1966, the fifth suggested judicial remedy, (*One Man-One Vote* p. 15), that of weighted voting, was imposed upon the county government of Suffolk County for a minimum period of 18 months. (R. 197)

[22a] App. 70, *infra*.

Through all the related cases, briefs and periodicals, we are met consistently with the statement that population is supreme and cannot be submerged. How, then, can the thoughts and principles of 15 men, scholars though they may be, be the constitutional guide to deprive up to as many as 317,000 people,[23] without their consent, of any effective voice in the government of Suffolk County?

Under the June 15, 1966 formula using the 1960 census as a base, the voting on the county board is as follows:

Town	1960 Census	Vote
Babylon	142,309	28
Brookhaven	109,900	22
East Hampton	8,827	2
Huntington	126,221	25
Islip	172,959	35
Riverhead	14,519	3
Shelter Island	1,312	1
Smithtown	50,347	10
Southampton	26,861	5
Southold	13,295	3
Total	666,550	134

A majority vote is 68. Islip, Huntington and Babylon combine to 88 votes; Islip, Babylon and Brookhaven to 85 votes; Islip, Huntington and Brookhaven to 82 votes; Babylon, Huntington and Brookhaven to 75 votes; Islip, Babylon and Smithtown to 73; and Islip, Huntington and Smithtown to 70 votes.

[23] The population of 7 towns of Suffolk County whose supervisors are unnecessary to form a majority weighted vote.

Islip, therefore, can make 5 three-town combinations; Babylon and Huntington 4; Brookhaven 3 and Smithtown 2 to pass or defeat any measure.

Theoretically, the Supervisors of Islip, Huntington and Smithtown, representing 349,527 in population, could be elected on the "Bad Government Party" by a bare majority of 174,766 voters. All other voters or a majority of voters in the county could be in favor of the "Good Government Party", which would still be completely powerless under weighted voting. Appendix B[23a] would render these figures more astounding because many people do not vote. Weighted voting simply permits the continued control by minority.

For the five towns comprising the easterly half of the geographical area of the county, to pass or defeat legislation, they must have the assent of 3 of the 5 towns comprising the westerly half of the county or 8 of 10 towns must agree.

Virtually, these five representatives have no effective political voice on the board; their votes are completely debased and diluted. The entreaty is worthy: "One man—One vote—One voice!"[12] King, *Local Apportionment,* 15 Buffalo L. Rev. 120 (1965).

Weinstein in *The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government,* 65 Colum. L. Rev. 21; does not favor weighted voting where the discrepancies in voting power are extreme and comments, p. 45, n. 99:

"Consider a deliberative body composed of members who vote independently and on the average

[23a] App. 21-22, *infra.*

are 'correct' under some criteria more often than not. It can be mathematically demonstrated that the majority vote of such a body will be 'correct' more often, on the average, than any of its members. * * * The table below graphically illustrates that under certain weighted voting proportions the percentage of 'correct' answers decreases; *in no circumstance can the percentage increase.*" (emphasis added)

Thus, prior to June 15, 1966, a majority of six board members were "correct" more times than any individual member was "correct"; since June 15, 1966 up to 7 of the same men can still be "correct" and the measure will pass or fail on the votes of but 3 men.

Using the formula of the permanent Plan, the vote commencing January 1, 1968 will be:

Town	1960 Census	Vote
Babylon	142,309	29
Babylon No. 2		28
Brookhaven	109,900	22
Brookhaven No. 2		22
East Hampton	8,827	4
Huntington	126,221	25
Huntington No. 2		25
Islip	172,959	35
Islip No. 2		34
Riverhead	14,519	6
Shelter Island	1,312	1
Smithtown	50,347	20
Southampton	26,861	11
Southold	13,295	5
Total	666,550	267

We have no computer available to us, cf. Banzhoff, *Weighted Voting Doesn't Work: A Mathematical Analysis,* 19 Rutgers L. Rev. 317, to determine the voting permutations and combinations of the permanent plan but it is evident that much of the board is without any real power.

> "Power in the legislative sense is the ability to affect outcomes. This is certainly evident when the power is used to determine the passage or defeat of a particular bill or resolution. It is also clear that in the prevoting, log-rolling and horse-trading stage which is an accepted part of the legislative process, a legislator is approached and is important (that is, has power) only to the extent that he will be able to affect the outcome when the issue reaches the floor of the legislature". *Weighted Voting,* p. 331.

Perhaps, the rural voter has no superior virtue—which point the 90,000 rural voters do not concede to the 15 learned scholars—but it is a mockery of constitutional institutions to give them representatives without any power.

Our government, major corporations and large newspapers abound with intellectuals who have come off the farm. Not all of them, however, left the farm and it will be a travesty for the future of this country if their voice in local governmental affairs shall be taken from them.

A further indictment of weighted voting is stated by Banzhoff, supra, p. 323 n:

> "Item 2 is the second weighted voting assump-

tion. It suggests that there is a simple mathematical relationship between the ability of a citizen to influence his legislator (since his interests are represented only to the extent that he and the other voters in his district can affect the representative's vote) and the size of the district. In view of how little is known about how a representative's vote is influenced by his constituents, and what is known about the effects of lobbying, influence, pressure groups and political maneuvering, the assumption is certainly deserving of further study and perhaps proponents of weighted voting should attempt to justify it."

As mentioned in the Jurisdictional Statement, pp. 12, 13, the District Court imposed weighted voting on June 15, 1966, and on August 4, 1966 unanimously concluded that the plan imposed was unconstitutional[23b] even though it was to be in effect, by their decree, for 18 months. We respectfully submit that this is too long a period for an unconstitutional reapportionment plan to be in force and effect, *Swann* v. *Adams*, 383 U.S. 210.

The inherent fallacies of all weighted voting plans for representational bodies has been recognized by Judge *Dooling* below (decision of August 4, 1966)[23c] and it would appear to be the accepted judicial thinking of the judges of the State of New York. *Graham* v. *Board of Supervisors*, 18 N.Y.2d 672, 273 N.Y.S.2d 419, 219 N.E.2d 868, *Shilbury* v. *Board of Supervisors*, 46 Misc.2d 837, 842-843, 260 N.Y.S.2d 931, aff'd 25 App. Div. 2d 688; 267 N.Y.S.2d 1022, *Barzelay* v.

[23b] App. 69, *infra*.

[23c] App. 72-73, *infra*.

Board of Supervisors, 47 Misc.2d 1013, 263 N.Y.S.2d 854, *Davis* v. *Board of Supervisors,* 51 Misc.2d 347, 273 N.Y.S.2d 133, *Morris* v. *Board of Supervisors,* 50 Misc.2d 929, 931, 932, 273 N.Y.S.2d 453; *contra, Town of Greenburgh* v. *Board of Supervisors,* N.Y.L.J. Feb. 10, 1967 p. 18 (on a ratio of 7⅓ to 1).

While *Gray* v. *Sanders,* 372 U.S. 368 is distinguished as a voting or franchise case from the problem presented by a representation case such as this, it has also been held not to be inapposite, in toto, to a representation case, *Reynolds* v. *Sims,* 377 U.S. 533, 560.

Here the weighting of votes of the representatives is based upon residence of the representative. Each Islip representative will be accorded 3 to 4 additional votes because he resides in a town wherein also reside 15,000 to 20,000 inmates of a state mental institution correctly counted as people in the decennial census. This weighting is equally as bad as the impermissible weighting in *Gray* v. *Sanders.* See also dissent of Douglas, J. in *Fortson* v. *Morris,* — U.S. —, 17 L. ed. 2d 330, 336.

While the appeal in this case was, perforce, launched prior to the adoption by the Board of Supervisors of a permanent plan, such plan has now been adopted and ratified by the voters.[24] (Appendix B, App. 21-23).

The plan and its constitutionality is before this Court by stipulation of the parties. (Appendix B, App. 11-12).

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[24] While of those voting on the proposition, a majority voted in favor; of those entering the voting booth in Suffolk County on November 8, 1966, only 39% voted in favor of the reapportionment plan, 30% voted against and 31% ignored it completely.

Consequently, this Court is not asked to violate either of the rules to which it has "rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, New York and Philadelphia S.S. Co.* v. *Commissioners of Emigration,* 113 U.S. 33, 39.

We ask that the permanent plan be declared violative of the equal protection clause and that if the complaint is not dismissed the case be remanded to the District Court for the purpose of directing the adoption by the Board and the voters of a constitutionally permissible plan of representation in the conduct of the county government.

Additionally, and again, if the complaint is not dismissed, since this Court has the power to modify, as well as to affirm or reverse, a decree, 28 U.S.C. 2106; *Hague* v. *C.I.O.,* 307 U.S. 496, 518, we ask that the order of June 15, 1966 be modified to direct the Board of Supervisors to adopt a constitutional plan of representation. We ask that pending the adoption of such a plan the conduct of county government be continued on the basis of one vote for each supervisor.

While it will be argued that a continuance of one vote per supervisor will result in a 5 to 5 deadlock, we submit such an assumption is untrue. Not until this Court acts on this appeal, will it be known whether or not the reapportionment of Suffolk County is constitutionally required. The five "east end" supervisors have heretofore acted on the assumption that

reapportionment is not constitutionally required. If the decision is that it must be reapportioned, it can and should be presumed that the Board will carry out its legal duties. cf. *Baker* v. *Carr,* 369 U.S. 186, 198.

Conclusion

The judgment below should be reversed and

(1) The Complaint dismissed, or

(2) The matter remanded to the District Court for proceedings or hearings in accordance with standards and mandates set by this court in its opinion, or

(3) Local Law No. 4 providing for weighted voting should be declared unconstitutional and the matter remanded for the purpose of preparing a constitutional plan of apportionment pending which the board of supervisors should function on the basis of one vote per supervisor.

Respectfully submitted,

GEORGE W. PERCY, JR.,
Suffolk County Attorney

STANLEY S. CORWIN
Assistant County Attorney

REGINALD C. SMITH
HOWARD M. FINKELSTEIN
PIERRE G. LUNDBERG

February 1967

Appendix A

History of Suffolk County

The towns of Suffolk County are "New England" towns.

"The chief pioneers of Southold came to America from Southwolde, Suffolk County, England, in 1637, and from other places about that time . . . Reverend John Youngs and his family sailed from England to Salem, Massachusetts, in 1637." We know that they were at Southold in August, 1640 when they purchased lands from the Indians.[1]

Southold originally included all of the Town of Shelter Island and all of the Town of Riverhead. Shelter Island was detached from Southold in 1730.[2] Riverhead was detached from Southold by special act of the Legislature on March 13, 1792.[3]

Southold was in operation as a town, under the colony of New Haven in Connecticut, as early as 1640, under Governor Eaton and the magistrates of New Haven.[4]

The Town of Southampton was settled from other emigrants from Connecticut and Massachusetts in 1640, under a patent from James Farrett, the agent of Lord Sterling, dated April 17, 1640. It immediately organized itself as a town and did "settle thereupon with as full and free liberty, both in church order and civil government, as the plantations in Massachusetts enjoyed."[5]

Southampton, between 1640 and the time of the Duke's Laws in 1665, as well as for many years thereafter, was a complete governing unit apparently independent of any

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[1] The Story of Southold, Ella B. Hallock, 1915 pp. 68 and 69.

[2] History of Long Island, by Nathaniel S. Prime, 1845, p. 162.

[3] Hallock, p. 70.

[4] Prime, p. 131.

[5] Prime, p. 188.

colony, with allegiance solely to the King. It enacted all manner of laws and defined several classes of crimes, including trespass, rash and profane swearing, drunkenness, fornication, blasphemy, murder, adultery, defiling of a woman espoused, and man-stealing.[6]

East Hampton's earliest record of organized operation of the town was in 1648, and it was first known as Maidstone.[7] East Hampton also enacted laws and ordinances relating solely to the town.[8]

Brookhaven, the largest town in the state, has a record of a settlement in 1655 by a company of fifty planters.[9]

Smithtown was settled between 1659 and 1663, and Governor Nicoll gave one, Richard Smith, a patent for the town on March 3, 1665, but this town was not recognized as such until the passage of the Act of 1683.[10]

Huntington was first based upon a purchase from Governor Eaton of New Haven in 1646, and, until the year 1872, included the Town of Babylon and stretched from Lloyd's Neck on the north to the ocean on the south. "In its original organization, thi town, like the most of the others, was a perfectly independent government founded by the voluntary association of sovereign people. In 1660, for the purpose of security against external aggression, and especially to secure themselves from coming under the jurisdiction of the Dutch, they were taken, by their own request, under the government of the Hartford colony. After the surrender of the New Netherlands to the British, this town was, with great reluctance and after

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[6] Prime, pp. 189 and 190.

[7] Prime, p. 170.

[8] Prime, p. 171.

[9] Prime, p. 222.

[10] Prime, p. 240.

much opposition, finally constrained to submit to the government of the Duke of York."[11]

Islip Town was not recognized in the Duke's Laws nor in Chapter 4 of the Colonial Laws. It was composed mostly of "sterile plains and vast swamps."[12] While there is some evidence of early occupancy, it never appears as a town in any of the records until 1710, when the colony enacted Chapter 223. The statute describing the "Districts & Precincts of Islip" has stated the bounds and authorized this town to elect two assessors and a collector, also a constable and "supervisor for the keeping of the peace & auditing their public accounts, at the usual time the County of Suffolk hath or shall do."

In the name of the Duke of York, the deputy governor, Richard Nicoll, on February 8, 1665, called a convention of deputies from the various towns extending from Brooklyn to Montauk, and including Westchester, and the area was known as Yorkshire, and deputies from Huntington, Brooklyn, Southold, Southampton and East Hampton attended. They enacted what has been later referred to as the Duke's Law. These laws related to many things, including weights and measures, brands for horses, a "certificate of his good behaviour" for a tavern keeper, and trading with the Indians. They divided Yorkshire into separate districts which were denominated *ridings*. The towns now included in Suffolk County constituted the east riding.[13] The eastern towns of Long Island submitted, with utter reluctance, to the Duke's Laws. "Some attempts were made to retain their connection (with Connecticut), and they were renewed on more than one occasion thereafter."[14]

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[11] Prime, pp. 248 and 249.

[12] Prime, p. 246.

[13] 1 Thompson's History of Long Island, pp. 184-196.

[14] Thompson, p. 197.

Appendix A

Suffolk County was formally created in 1683. Under the orders of the Duke of York, elections in the several towns were ordered, and representatives were summoned to meet in New York on October 17th of that year.[15] The result was the passage of an Act on November 8, 1683 to divide the colony, and is now known as Chapter 4 of the Colonial Laws of New York. This chapter refers to the county as being divided into the Towns of Huntington, Smithfield, Brookhaven, Southampton, Southold and East Hampton.

In between the enactment of the Duke's Laws and the formal creation of the county in 1683, the Town of Southampton received a colonial charter, known as the Andros Patent, on November 1, 1676. From that day to this day, there has existed in the Town of Southampton a governmental body known as the Town Board, and another body corporate known as the Trustees of the Freeholders and Commonalty of the Town of Southampton. These trustees, under the Andros Patent of 1686 and the Dongan Patent of 1686, and under Chapter 155 of the Laws of 1818 and Chapter 283 of the Laws of 1831, continued to and now hold the title to lands under waters within the bounds of the town. The rights of these trustees have been affirmed time and again by the courts of the state, the last of which appears to be the decision in *People* v. *Miller and Burnett*, 260 N.Y. 585, affirming 235 App. Div. 226 (1932).

By Chapter 133 of the Laws of 1703, provision was made for the election of a supervisor at the annual town meeting, for the purpose of representing the town on the board of supervisors. The board of supervisors was to meet on the first Tuesday of October to "Examine & Compute all Such Publick necessary & Contingent Charges as they shall find their respective Counties properly chargeable with."

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[15] Prime, p. 62.

Appendix A

Section XXXV of the Constitution of 1777 provided in part, "that such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony on the 19th day of April, in the year of our Lord 1775, shall be and continue the law of this State." *Beers* v. *Hotchkiss,* 256 N.Y. 41, 53.

This provision as to the colonial laws of New York of the New York State Constitution has continued to this day, Article I section 14.

In *Matter of Noble,* 34 App. Div. 55 (Second Dept. 1898), 54 N.Y.S. 185, Mr. Justice Willard Bartlett, writing for a unanimous court, in relation to some problems of representation of the new County of Nassau, which had been carved out of the County of Queens, at page 58, said:

> "But in any event, the Nassau County Act leaves the three towns precisely in the same position, so far as their supervisors are concerned, as other rural townships throughout the State. Each town has it duly elected supervisor, *who represents* it as a member of the board of supervisors of the county in which the town is situated." (Emphasis supplied)

Following *Matter of Noble,* Mr. Justice Munder of the Supreme Court, Suffolk County, on October 22, 1964, writing in *Klan* v. *County of Suffolk,* 44 Misc. 2d 351, aff'd 22 App. Div. 2d 708, 254 N.Y.S. 2d 519, stated that the supervisors of Suffolk County were "in fact town officers." He said, "While they may be deemed to be county officers while acting on the Board of Supervisors, they are chosen by their several towns respectively and are in fact town officers."

Appendix A

Reverting again to the decision of Mr. Justice Bartlett at page 58, we find that he said:

> "Although the board of Supervisors is a county organization, its members are not elected by the body of electors of the county, but are chosen by the electors of their several towns respectively, and individually they are classed as town officers. (Town Law, art. 4, §12.) 'The supervisors of the cities and towns in each county, when lawfully convened, shall be the board of supervisors of the county.' (County Law, §10.)".

The authority of the supervisors in these towns was minimal for at least two hundred years after the county was organized. When it was necessary to create a court house in 1727, the Legislature, by Chapter 504, authorized the justices of the peace to build the court house. We find the supervisors in a dispute in 1729, and the Legislature settled it by prescribing the date of the annual meeting of the supervisors, and it further provided for their "wages", and that such wages shall be "raised and paid to each of them by each respective Town Manor and Precinct for whom they are supervisors, in the same manner and under the same regulations as the other public charge in each respective Town Manor or Precinct is paid." (Chapter 537 of the Colonial Laws).

In 1732, they had no control over the highways, nor any responsibility for providing them. The Legislature, by Chapter 575, created a commission to lay out highways in the Towns of Southampton and East Hampton, and provided for a tax therefor, as well as the recording of the highways in the office of the clerk. In 1768, the County did not build the jail and court house; it was done under Chapter 1341 of the Colonial Laws.

Appendix A

In 1763, by Chapter 1220 of the Colonial Laws, the supervisors of the towns were given the authority to equalize assessments in the various towns.

During and immediately following the Civil War and the time of the consideration of the Fourteenth Amendment, the town government was relatively simple, and the duties of the Board of Supervisors of the County were relatively unimportant. The minutes of the Town Board of the Town of Riverhead show that there was one meeting in the year 1866 and another meeting in the year 1867. The business of the Town Board was principally to tabulate the votes of the town meeting which occurred on the same day. These were meetings and not "elections" as we know them today. The supervisor, in 1867, was John C. Davis, and there were three justices of the peace who sat with him on the board. They audited the bills, they provided for the payment of $500.00 on the war bonds, and they "voted that the supervisor be instructed on part of the Town to oppose the building of a County Poor House." These instructions were common throughout the history of these various towns.

The record of the proceedings of the Board of Supervisors in 1867 also illustrates the limitations of authority and the narrow sphere of operations. The annual meeting of the Board commenced on October 1, 1867, recessed to October 2nd, recessed to October 8th, and met on October 8th, 9th and 10th. They had special meetings on January 2nd, April 30th, September 3rd, and November 13th. In the whole year's work, they considered nineteen items. These items consisted of a claim for a war bond refund, County's report on the Poor House, revocation of a previous resolution about oysters, the auditing of bills, the purchase of paper for the assessment rolls, the equalization of the assessments, an unofficial recommendation to provide rooms for the members of the

National Guard, the distribution of the excise taxes, the auditing of the county books of account, showing a balance of $6,940.75, receipt of a report of the superintendent of the County Poor House, a resolution relating to school taxes on non-resident landowners, a warrant to raise $19,585.00 for contingencies, fixing $3.00 per week for food for the prisoners, the designation of an official newspaper for the publication of the State Sessions Laws, a petition to require the taxation of the Shinnecock Reservation Indian lands, a provision for a levy for the overseers of highways, the annual tax resolution for $164,096.00 for the town charges as well as the county expenses, provision for the board in the State asylum of an idiot, the receipt of a report of the auditors of a U.S. Deposit Fund, and the fixation of a capital tax on all corporations doing business in the county. The tax warrant issued to the various collectors of the towns in 1867 shows a division of the warrant for various purposes, including school tax, support of town poor, state tax and war tax. The large amounts were the state tax, the war tax and the school tax. The county tax, for all of its county charges, amounted to $19,585.79. These are the operations of the Board of Supervisors of Suffolk County in the year that the Fourteenth Amendment was ratified.

Annexed hereto is a table showing the distribution of the population in the year 1845, as shown by Prime's History, and in 1860, as shown by the Federal Census.

The population figures in 1845, based on the data in Prime's History of Long Island, and the population figures in 1860, pursuant to the United States Census, as shown by the table annexed hereto, reveal some interesting data.

In 1845, Southampton had more than three times the population of either Smithtown or Islip. Southold had more than twice the population of either Smithtown or Islip. Riverhead had a greater population than either

Smithtown or Islip, and so did the Town of East Hampton.

In 1860, Southampton had more than three times the population of Smithtown. Leaving out of consideration the Town of Brookhaven, which is a vast area of 152,000 acres, and the Town of Shelter Island, and computing the population of the other four eastern towns, we find that, in 1845, there was a total population of 15,483, and of the four western towns of 10,627. Computing the four normal eastern towns and the four normal western towns, we find that, in 1860, the four eastern towns had 18,000 people, and the western towns had 15,000 people. We, therefore, find that it is indicated that the eastern towns, who created and pioneered the government of the county, had an imbalance and larger population than the barren western towns for nearly two hundred years.

	Acres	Population 1845 Prime	Acres per person 1845	Population 1860 U. S. Census
Southampton	71 500 —	6 536 —	14	6 803
Southold	52 000	4 375 —	12	5 833 —
Riverhead	36 500	2 433 —	15	3 044
East Hampton	45 388	2 139	33	2 267
Brookhaven	152 500	7 625	20 —	9 923
Huntington and	59 977	4 263	14	5 756
Babylon	32 768	2 346	14	3 168
Smithtown	38 000	1 900	20	2 130
Islip	72 000	2 118	34	3 845
Shelter Island	10 000	500	20	506

Appendix B

Stipulation

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil Action No.

62 C 821

I. WILLIAM BIANCHI, JR., and QUENTIN B. SAMMIS and TOWN OF HUNTINGTON,

Plaintiffs,

—against—

BOARD OF SUPERVISORS OF SUFFOLK COUNTY, NEW YORK, et al.,

Defendants.

IT IS STIPULATED by and among counsel that the following portions of the record, in addition to those portions designated in the Notices of Appeal of the defendant Board of Supervisors and the intervenor-defendants dated June 30, 1966, shall be certified by the Clerk of the above Court and transmitted to the Clerk of the Supreme Court of the United States.

1. So much of the transcript of the September 30, 1963 hearing as was not previously filed with the Clerk of the Court shall be prepared in typewritten form, filed with the Clerk, and certified, pursuant to this stipulation.

2. The letter of Frederic Block dated March 11, 1965 addressed to George W. Percy, Jr., County Attorney.

Appendix B

3. Letter of George W. Percy, Jr., dated June 30, 1966 and annexed resolutions of defendant Board of Supervisors.

4. July 15, 1966 notice of motion and objections of plaintiffs Town of Huntington and Sammis.

5. July 18, 1966 Notice of Motion and objections of intervenor-defendants.

6. Transcript of July 28, 1966 hearing.

7. Certification by the Clerk of the Suffolk County Board of Supervisors as to the votes cast by the Supervisors August 22, 1966 relative to adoption of Resolution 590–1966 (Local Law No. 4, 1966), with a true copy of said Resolution attached.

8. Certification dated December 3, 1966 of the Suffolk County Board of Elections as to the popular vote in connection with the November 8, 1966 adoption of "County Question Number One."

Dated: Riverhead, New York
December 20, 1966.

FREDERIC BLOCK
Attorney for plaintiff
I. William Bianchi, Jr.

RICHARD C. CAHN
Attorney for plaintiffs
Quentin B. Sammis and Town
of Huntington

Appendix B

GEORGE W. PERCY, JR. PGL
Attorney for defendant Board of Supervisors of Suffolk County, New York

PIERRE G. LUNDBERG
Attorney for defendants Town of Southampton, Town of East Hampton, Town of Riverhead, Town of Southold and Town of Shelter Island; Robert T. Cameron, individually and as Supervisor of the Town of Southampton; Edward V. Ecker, individually and as Supervisor of the Town of East Hampton; Robert B. Vojvoda, individually and as Supervisor of the Town of Riverhead; Lester M. Albertson, individually and as Supervisor of the Town of Southold and Evan K. Griffing, individually and as Supervisor of the Town of Shelter Island.

Appendix B

Item 2 of Stipulation

LAW OFFICES
BURNS AND BLOCK
Main Street & Maple Place
Port Jefferson, New York 11777

Area Code 516—HR 3—0343

ROBERT J. BURNS
FREDERIC BLOCK

March 11, 1965

Hon. George W. Percy, Jr.
County Attorney
Suffolk County
Suffolk County Center
Riverhead, New York

re: Bianchi, et ano. v. Griffing, et al.

Dear Sir:

This will acknowledge receipt of your request in behalf of the defendants in the above-captioned matter for an extension of time to interpose an answer to the complaint.

Please be advised that it has always been the plaintiffs' understanding that issue in this case was joined on September 30, 1963, the date of the hearing before the specially convened Three-Judge Federal District Court. On that date certain Stipulations were entered into in open court of which there is record evidence, the result of which enabled the Court to take the case on the merits, in addition to its consideration of the defendants' motion to dismiss.

Therefore, the plaintiffs consider the recent decision of

the Three-Judge Federal Court to be a decision on the merits after joinder of issue, and consequently, the plaintiffs will resist any efforts on the defendants' behalf to now interpose any additional answer at this juncture.

Very truly yours,

FREDERIC BLOCK
Frederic Block

FB:lj
ccs: Richard C. Cahn, Esq.
Stanley S. Corwin, Esq.

Item 7 of Stipulation

PASSED AUGUST 22, 1966, AND ADOPTED AFTER A PUBLIC HEARING ON AUGUST 29, 1966.

RESOLUTION No. 590—1966, ADOPTING LOCAL LAW No. 4—YEAR 1966, COUNTY OF SUFFOLK, NEW YORK.

WHEREAS, there was duly presented and introduced to this Board of Supervisors at a regular meeting held on August 8, 1966, a proposed local law entitled, "A LOCAL LAW AMENDING THE SUFFOLK COUNTY CHARTER BY CREATING THE POSITION OF ADDITIONAL REPRESENTATIVES UPON THE BOARD OF SUPERVISORS FROM THE MORE POPULATED TOWNS AND PROVIDING FOR CALCULATING THE VOTE TO WHICH EACH TOWN'S REPRESENTATIVES SHALL BE ENTITLED UPON SUCH BOARD", and said Local Law in final form is the same as when presented and introduced; now, therefore, be it

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RESOLVED, that said Local Law be enacted in form as follows:

LOCAL LAW NO. 4—YEAR 1966, COUNTY OF SUFFOLK, NEW YORK.

A LOCAL LAW AMENDING THE SUFFOLK COUNTY CHARTER BY CREATING THE POSITION OF ADDITIONAL REPRESENTATIVES UPON THE BOARD OF SUPERVISORS FROM THE MORE POPULATED TOWNS AND PROVIDING FOR CALCULATING THE VOTE TO WHICH EACH TOWN'S REPRESENTATIVES SHALL BE ENTITLED UPON SUCH BOARD.

BE IT ENACTED BY THE BOARD OF SUPERVISORS OF SUFFOLK COUNTY, AS FOLLOWS:

Section 1. Section 203 of The Suffolk County Charter is hereby amended by deleting all of the text thereof and substituting therefor the following language:

Section 203. Voting; quorum. (1) The Board of Supervisors shall consist of the supervisor of each town and additional representatives from such towns as are entitled thereto. A majority of the whole number of the votes of the members of the board shall constitute a quorum. Except as otherwise provided herein, local laws and resolutions shall be adopted by a vote of not less than a majority of the total voting strength of the board. In case of a tie vote on any matter at any meeting of the board of supervisors the county executive shall have a casting vote, provided, however, that he shall not have a vote as to any local law or resolution which provides a new form of government for the county or changes the voting strength

of the supervisors or which changes the location of the county seat.

(2) The supervisor and additional representatives, if any, of each town shall cast at meetings of the Board of Supervisors, in the aggregate, a number of votes equal to the quotient, to the nearest whole number, obtained by dividing by two thousand five hundred the number of inhabitants, excluding aliens, of the town from which they were elected, as determined by the last decennial federal census; provided that no supervisor or additional representative shall have less than one vote; and provided, further, that each town having a population, as determined by the last decennial federal census, of more than one hundred thousand persons, shall have one additional representative upon the Board of Supervisors for each additional one hundred thousand inhabitants, or fraction thereof, and, in the case of such towns, the supervisor and the additional representatives shall divide equally the votes to which said town is entitled; and provided further that in the event such votes cannot be equally divided between the supervisor and additional representatives, the supervisor shall be entitled to cast the extra votes.

(3) The assignment of votes among the members of the Board of Supervisors shall be readjusted within sixty days after the public announcement of the enumeration of the inhabitants of the county in each decennial federal census. The county clerk shall make the calculations required by this section and file the same with the Board of Supervisors, and thereupon each supervisor and additional representative shall be entitled to cast the votes assigned to him by such calculation and not otherwise. The action of the county clerk in this respect shall be deemed to be a ministerial act.

(4) The term of each additional representative created hereunder shall begin on the first day of January next succeeding the election at which they were elected and they shall hold their respective offices for two years. A vacancy in the office of such additional representative shall be filled by the town board of the town in which the vacancy exists for the unexpired term. Such additional representative shall have all of the qualifications for office required of town supervisors.

Section 2. This local law shall take effect January 1, 1968 upon approval by the qualified electors of Suffolk County at the November 8, 1966 general election; provided, however, that the positions of additional representatives to be created hereunder shall be filed by the voters of the towns entitled thereto at the November, 1967 general election.

Section 3. This local law is enacted pursuant to the orders and decisions of the United States District Court for the Eastern District of New York.

Said orders and decisions are premised upon the applicability of federal judicial jurisdiction over county forms of government in New York State and further premised upon the applicability of the equal protection clause of the New York and United States Constitutions to county forms of government in New York State. Notwithstanding the provisions of Section 2 hereof, this local law shall be deemed rescinded, repealed and annulled upon the date of any decision or order of the United States Supreme Court which overrules or invalidates said order or orders or

holds inapplicable one or more of the premises upon which said order or orders were based.

Dated: August 22, 1966

APPROVED:

By /s/ H. LEE DENNISON
County Executive of Suffolk County, after a public hearing duly held on August 29, 1966.

At a stated meeting of the Board of Supervisors held on August 22, 1966, Supervisor Klein moved the adoption of the foregoing resolution which was seconded by Supervisor Raven. A poll vote was taken with the following results: in favor—Supervisors Dominy (22), Klein (10), Hanse (28), Raven (35), Kane (25): total 120; opposed—Supervisors Albertson (3), Cameron (5), Ecker (2), Vojvoda (3), Griffing (1): total 14. The Presiding Officer declared the resolution adopted.

A certificate of the Suffolk County Board of Elections advising of the approval of the local law, passed by the adoption of the said resolution, by the qualified voters of the County at the November 8, 1966 general election was received in the office of the Clerk of the Board of Supervisors on December 16, 1966, and a certificate of the adoption of the local law was mailed for filing in the office of the Secretary of State on December 19, 1966.

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SUFFOLK COUNTY)
BOARD OF SUPERVISORS)
RIVERHEAD, NEW YORK) THIS IS TO CERTIFY that I, the undersigned, Deputy Clerk of the Board of Supervisors of Suffolk County, New York, acting pursuant to authority in the absence of the duly appointed Clerk thereof, have compared the foregoing resolution with the original resolution now on file in this office and which was duly adopted by the Board of Supervisors on August 22, 1966, and approved by the County Executive after a public hearing duly held on August 29, 1966, and that the same is a true and correct transcript of said resolution and the whole thereof.

Subjoined thereto is the result of the poll vote taken on the adoption of the resolution and a statement of the receipt of election information and the action taken thereon by this office, all of which is based on official records on file in this office.

IN WITNESS WHEREOF, I have hereunto set my hand and the official seal of the Board of Supervisors of the County of Suffolk on December 19, 1966.

RUTH P. BUYS
Deputy Clerk of the Board

Appendix B

Item 8 of Stipulation

STATEMENT OF THE COUNTY BOARD OF CANVASSERS

of the County of Suffolk in Relation to the votes given for

COUNTY QUESTION NUMBER ONE

The Board of County Canvassers of the County of Suffolk, having met on the 9th day of November, 1966, to canvass and estimate the votes given in the several election districts of said county at the general election held on the 8th day of November, in the year aforesaid, do certify as follows:

That it appears on such estimate and canvass that:

The whole number of votes given for COUNTY QUESTION NUMBER ONE was		
Two hundred ninety-two thousand thirty-four		292,034
of which		
YES	received One hundred thirteen thousand one hundred ninety-six	113,196
No	received Eighty-eight thousand four hundred eighty	88,480
	Total Number of Blank Votes was Ninety thousand three hundred forty-two	90,342
	Total Number of Ballots rejected as Void was Sixteen	16

A town by town breakdown follows:

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COUNTY QUESTION NUMBER ONE

County of Suffolk

General Election, November 8, 1966

Town	Whole Number	Yes	No	Blank	Void
Smithtown	27,069	12,076	8,316	6,675	2
Islip	65,726	26,665	18,188	20,864	9
Babylon	53,910	22,077	12,451	19,380	2
Huntington	57,995	28,330	14,185	15,479	1
Brookhaven	56,075	19,769	17,722	18,583	1
East Hampton	4,726	710	2,615	1,401	0
Riverhead	5,959	824	3,031	2,104	0
Shelter Island	995	74	724	197	0
Southampton	12,555	1,917	7,088	3,549	1
Southold	7,024	754	4,160	2,110	0
Total-County	290,034	113,196	88,480	90,342	16

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State of New York,
County of Suffolk—ss.:

We hereby certify that the foregoing is a true and correct statement of the votes cast for the foregoing named office as shown by the original return filed with the Board of Elections in Yaphank, New York.

EVERETT F. McNAB
ARTHUR WEISS
Commissioners of Elections

State of New York,
County of Suffolk—ss.:

We hereby certify that we have caused to be compared the foregoing statement of canvass with the original statement on file in this office and that the same is a correct transcript therefrom and the whole thereof.

IN WITNESS WHEREOF, we have hereunto set our hands and the seal of the office of the Board of Elections on this 3rd of December, 1966.

EVERETT F. McNAB
ARTHUR WEISS
Commissioners of Elections

(Seal)

Appendix C

Balance of Transcript of September 30, 1963 Hearing Before 3-Judge Court*

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

62-C-821

I. WILLIAM BIANCHI, JR., & ANO.,

Plaintiffs,

—against—

EVANS K. GRIFFING, et al.,

Defendants.

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271 Washington Street
Brooklyn, New York
September 30, 1963
10:00 o'clock A.M.

Before:

CIRCUIT JUDGE LEONARD P. MOORE
DISTRICT JUDGE WALTER BRUCHHAUSEN
DISTRICT JUDGE JOHN F. DOOLING, JR.

Appearances:

MESSRS. CAHN & CAHN
Attorneys for Plaintiffs
BY: FREDERICK BLOCK, Esq., of Counsel

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* See Stipulation, Item 1, page App. 11, supra. This was not available for printing in the Record and is printed herein at Respondents' request. Preliminary colloquy is set forth in Record at pages 115 to 123.

Appendix C

GEORGE U. PERCY, Esq.
County Attorney, Suffolk County
Attorney for Board of Supervisors of Suffolk County
BY: STANLEY CORWIN, Esq., of Counsel

Mr. Corwin: Very well, your Honor. We would like to sort of combine in one presentation the federal question and jurisdiction over the subject matter. I am certainly not going to restate what is in the brief. But I would like to stress this morning a prospective that I don't think was presented in the briefs the way that we would like to have it understood.

We think what is wrong with the convention of the Three Judge Court is that we are not dealing here with a statute of state-wide significance. Now we made originally a concession that this was a State Statute. Now that concession was made because we were dealing with a statute made by the Legislature of the State of New York and not some local ordinance made by a municipal corporation. The statute, however, is not of state-wide significance because it applies only to Suffolk County.

In that connection, I would call your Honor's attention to the letter that I presume yon have received, either directly or through the Clerk, from the Attorney General, who makes that point and has cited cases in support of the position that it is not a statute of state-wide application.

The plaintiffs in their brief has said "All the powers with which the County is entrusted are powers of the State." Now we subscribe to that statement. We subscribe too to the statement they made quoting Gomillian against Lightford (phonetic) "But when a State exercises power locally within the domain of State interest it is insulated from judicial review."

Now in Gomillian they said that because of other factors

those State powers were being used to protect or circumvent federally protected rights. The point we are making is that there is no federal protection to the towns or to the counties. There is no right we say to a Republican form of Government under the Federal Constitution below the State level.

Judge Moore: One of the points that bothered me a little bit in reading your brief was the fact that were it not for this charter I assumed that it would be the State that had supervisory or controlling powers with respect to the acts within the county. Now am I wrong on that?

Suppose there had been no charter at all and no local form of government, would not the State then be vested exclusively with those rights and powers?

Mr. Corwin: They are in any event, and what the situation then would be is that the Government in Suffolk County would be governed by a State Statute of state-wide application. I think it is Section 153 of the County Law.

Judge Moore: Which would come then within the Federal jurisdiction if——

Mr. Corwin: Not Federal. That right is presently protected, the rights of the counties and the towns are federally protected under the New York State Constitution. There is a provision—perhaps if you will bear with me for just a moment—the New York Court of Appeals under a constitutional clause declaring that all city, town and village officers whose elections are not provided for by this constitution shall be elected by the electors of such cities, towns and villages or some division thereof, or appointed by such authorities thereof as the Legislature shall designate for that purpose. Now some of that is in quotes.

They say that the Court of Appeals has many times held that local officers cannot be appointed by the State

Legislature nor by any other agencies than the governing bodies of the municipal corporation.

This clause, according to the New York Court of Appeals, amounts to an express reservation of the right of local self-government. And we should be the last ones to say that the people in the towns and villages and the cities of the counties don't have under the New York State Constitution certain rights protected by that Constitution.

Judge Bruchhausen: What are you alluding to, the Court of Appeals opinion now?

Mr. Corwin: No. This is not a Court of Appeals opinion, Judge. They do not cite one case on that.

Judge Bruchhhausen: What are you reading from?

Mr. Corwin: I am reading from an excerpt from Manitou on Municipal Corporations, Volume 1, Chapter 2, Page 83, and the case that is cited there is People ex rel. Bolton versus Albertson in 55 New York at page 50. Also cited is Ratherbone versus Wirth 150 New York 459.

Judge Dooling: Now, this is on the thought that when you get below state-wide level to a matter of purely local concern, and legislatures dealing, subsidiary legislatures, if you want to call them that, dealing with matters of local concern rather than general concern, then you are outside (a) Section 228, Three Judge Courts, and possibly (b) you are at the side of the 14th Amendment, because there is no federal guarantee of one man one vote or anything like one man one vote for local affairs.

Mr. Corwin: That is correct.

Judge Dooling: One thing you didn't mention, 153 Subdivision 4 of the County Law, and we might as well get to that, which again——

Mr. Corwin: Except that it is not before the Court.

Judge Dooling: Isn't it necessarily before the Court because if the section of the charter were invalidated then

153 Subdivision 4 would fill its place and would again require one vote for each supervisor, wouldn't it?

Mr. Corwin: That is true.

Judge Dooling: And that is a state-wide law which applies in the absence, I take it, of any valid provision of any specific charter containing a different vote.

Mr. Corwin: That is true.

There is a weighted vote in Nassau County, and all of the others in the entire State with the exception of the Metropolitan area.

Judge Dooling: As I understand it, the Legislature of the State, notwithstanding the reduction of the charter of Suffolk County, can change the voting power subject to a referendum to the county population.

Mr. Corwin: I believe that they can change those powers and that voting strength by an act of the New York State Legislature, whether it is applicable to Suffolk County alone or applicable to all of the counties.

Judge Dooling: That is right. But then, as I understand it, such a thing, if it does effect the voting power of an elected officer, has to go back to the people of the county before it can become effective, or something like that in Article 9 of Section 2 of the Constitution.

Mr. Corwin: I don't think that that necessarily is so, although I am not saying that I am sure either.

We have an authority here, Mr. Sheldon Raab of the Attorney General's office, who is far better qualified than I to comment on that. I don't think that it is necessary to go that far, because I think that, as you yourself so well put it, as far as federal protection is concerned we don't have it all below the State level other than what is—and I shouldn't put this in the same sentence—other than what is protected by the State Constitution. There is a distinction.

Judge Dooling: Judge Moore's question is this: Sup-

pose you did not have a delegation of legislative authority to the County Board of Supervisors; those legislative powers would then be exercised by the State Legislature whom you would manifestly have a problem of state-wide concern. Therefore, the delegation leaves it a matter of state-wide concern because it is a delegation of sovereignty. Is that the point?

Judge Moore: Yes.

Judge Dooling: That takes us to the local laws which is Section 300.

Mr. Corwin: I don't think that that follows. I think except for the State Constitution which, of course, can be changed by the people of the State, that there isn't anything that says that the New York State Legislature can't govern Suffolk County by an appointed official.

Judge Moore: I think that is probably so. But Judge Dooling says, getting back to this 153 Subdivision 4, if we are thrown back to one vote per supervisor, then doesn't that raise the question as to whether a State can say one vote per supervisor per 1300 people as against 131,000 people?

Mr. Corwin: I don' think so because the Courts have held that, for example, a charter is not a contract, and they said that just because a city or any governmental municipal corporation has a charter, that there is no contract with the legislature that prevents the legislature from repealing, so they say the contract clause of the Federal Constitution doesn't help them.

The Courts have also held that they can't avail themselves of the privileges and immunities clause because the municipal corporation has no privileges and no immunities in opposition to the will of its creator, the Legislature. By the same token they said that it could not avail itself of the due process clause or the equal protection clause. The equal protection clause was a—Newark

against New Jersey, 262 U.S. 192, this was a case where the State of New Jersey imposed a water tax upon the City of Newark. It wasn't applicable to other cities in the State. They have held that there is no such thing as an implied State Constitutional provision. They have held that there is no inherent right for a local government.

In the plaintiff's brief citing Baker against Carr, no substantial federal question was raised by State Court's refusal to upset the districting of city council seats. I was talking about Tedesco against the City of New Orleans.

Now, we think that all of those things are sufficient to take this case completely away from any federal aspect of government of Suffolk County. We don't think that there is any protection for it at all.

But, if I may go on, assuming that the Court takes jurisdiction of the case, we think that there are very significant, equitable considerations.

Judge Moore: Still staying on jurisdiction, I wish I could see with great priority where this case fits into the picture. We have certain decisions from the Supreme Court which can be read with a certain amount of clarity, although I am inclined to agree with the dissent in Baker against Carr, that the standards are not too well set forth there.

But I was discussing with my colleagues before we came on the bench the fact that there must be some point at which the federal judicial system shall not come into being so as to regulate the affairs, and so I put this sort of frivolous, hypothetical example.

I am assuming, and my assumption may be wrong, that the Supreme Court would not wish to regulate the voting policy of the ladies Wednesday afternoon bridge club incorporated, and I take it, although I am not sure, I take that as one extreme. I take the cases that are in the

Supreme Court so they have the power at the other extreme.

Now, where does our county case fit in? If we are going to throw it on the side of the ladies bridge club, then I would be interested as to what the situation is with respect to all those organizations such as Fire Districts, School Districts, Garbage Districts that you referred to in your brief, because obviously if we have to set up a voting system for everyone of such districts in the entire United States, somebody is going to have a big job on their hands.

If, on the other hand, the county situation falls into the State side of the scale, then we have another situation and we will have to pay a little bit more attention to what has been said by the Supreme Court, I suspect.

Mr. Corwin: Well, let me be hypothetical. What we would like the Supreme Court to do is this, and this is our position about that, we say—let's put it this way—the United States District Court has said in the WMCA case, I guess the Circuit Court, no, that was a Three Judge Court, in the WMCA case the New York State Legislature is presently being elected properly, there is no invidious discrimination, there is no federally protected right being violated in the way that the New York State Legislature is constituted. That case is up on appeal and will be argued in five weeks before the United States Supreme Court, but now that is the law.

We say that now that you have got a legislature which is properly constituted, there is no invidious discrimination in the way that it is elected and the manner in which it sits and makes law, and it makes law which says that this is the way you will vote in this county, this is the way you will vote in this Fire District, this is the way you will vote in this School District. And we say until the Supreme Court grabs one of these things and says you are violating a federally protected right at that State

level, either with respect to State Legislatures or Congressional representation, we are not going to be concerned.

Judge Moore: You made your position very clear, but just to make sure that I have grasped it permanently, you say that so long as the Legislature of the State has been property elected that that Legislature so constituted from that point on can do anything that it wishes so far as saying how the Fire Districts and how the Counties in all handle their own affairs, and that that is the dividing line, and that once we determine the Legislature is proper, from that point on the Federal authorities better stay out of the picture and let them run their own affairs?

Mr. Corwin: Yes. And that is true because the sovereignty of the people, the sovereignty of the people is in their elected legislators at the State level.

Judge Dooling: They can always supersede a local law.

Mr. Corwin: Yes. They can make them and break them. They don't have to have any municipal corporations if they don't want.

Judge Dooling: Does this mean that in a State like New York that seems to be so vigorously devoted to home rule, that the State can always, notwithstanding that the county say has passed a local law of a certain tenet, supersede the effectiveness of that local law by a legislative act either in general or of local application, the limitation on its power to pass laws of local application being really only constitutional limitations and molded provisions like special messages of the Governor and so forth and so on. Is that true?

Mr. Corwin: That is true, but it is not quite that simple, and that isn't the approach that New York State makes.

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There is a constitutional question being placed before the voters this year to enhance the idea of home rule, and Mr. Raab, correct me if I am wrong in this presentation, but I think there is something like this in there, that if a municipal corporation passes an act that supersedes a state-wide act, and that they can do, that the State Legislature can't set it aside the first time around, they have to have two sessions of the Legislature.

Judge Dooling: Now, are the parties in agreement on the fact that the electorate is supposed to vote on these amendments to Article 9, Sections 1 and 2, plus the existence of new, what do you call it, Book 35C of the Municipal Home Rule Law for the counties and everything else, because if the people are about to express a view on this whole matter it would be a little premature for us to concern ourselves about it, wouldn't it?

Mr. Corwin: No, I don't think it makes any difference what the people do.

Judge Dooling: Or this constitutional change and the City Home Rule Law would make no relevant change in this set-up; that is the way I read it.

Now, is that a matter of agreement?

Mr. Corwin: I think it is.

Mr. Block: That the local home rule law would have no application to this case?

Judge Dooling: That it would not affect the substance and merit or want of merit of the present case.

Mr. Block: Of course we agree to that, that has no application to this case at all. It is not a relief that is readily available to the plaintiffs.

Am I understanding you correctly?

Judge Dooling: Well, here we are talking about Article 9, Section 2 of the New York Constitution and about the Suffolk County Charter. Now it appears that the

people are about to vote after the Legislature has voted on the whole matter of City Home Rule and County Home Rule with the view of setting up an entirely new City Home Rule Law and new constitutional provisions furnishing the framework for future adoptions of Home Rule Laws.

Now, I take it, that there isn't any self-operative change that will follow from the adoption of these amendments and the City Home Rule Law; is that it?

Mr. Corwin: This is a very novel approach to local home rule. I think we are getting a little bit aside from the question, but there is now a bill of rights for local government which has never before been proposed in any of the fifty States that I know of on jurisdiction, Judge.

Judge Dooling: Which seems to sort of create constitutionally and perhaps for the first time constitutionally a delegation of legislative authority to counties or to local bodies, because it says that their—or will say if adopted that every local government except the county wholly included within the city, shall have a legislative body elected by the people thereof, every local government shall have the power to adopt local laws as provided by this Article. So much it will say, at least, is that right?

Mr. Corwin: I agree wholeheartedly. But I don't think that this is being done by way of enhancing or extending any presently federally protected right.

Judge Dooling: Well, the existing power of local government is to find, as I understand it, with respect to anyone, other than the Attorney General, it seems to say that the power of a county through its Board of Supervisors includes the power to adopt, amend and repeal local laws in relation to the property, affairs or government of the county. All that lies beyond that is judicial interpretation.

Mr. Corwin: Yes, sir.

Judge Dooling: And that's the grant.

Mr. Corwin: Yes.

Judge Dooling: So that the question is are there significant powers of legislation vested in the County Board of Supervisors.

Mr. Corwin: Not that it can't be taken away from them.

Judge Dooling: However, you would say it is on a yo-yo basis for those who pull back?

Mr. Corwin: Yes.

Judge Dooling: Are there significant powers of the government vested in them as distinguished from what you could infer from Tedesco, which are so important to the electors that Baker against Carr applies, or they are so local, so subsidiary, so miniscule that they do not rise in the perspective of the federal protection?

Mr. Corwin: You are putting me on edge with a very sharp knife. My personal inclinations and I think the position I should be taking here may be a little bit different. However, we must say in answer to that question that we are concerned only with the local aspects, and even though they have the right in legislating in the field of the property and affairs of the community to supersede even a State Law, that it is still local in its impact and in its effect, in its intent and purpose. We think that that is a distinguishing feature. It takes it away from Baker against Carr.

I am about exhausted on this question of jurisdiction, but I don't want to leave it and pass onto the equitable consideration if the Court has any further questions.

Judge Moore: We don't want to exhaust you under any circumstances.

Mr. Corwin: I want to be helpful in this exchange of views, and, of course, we will get quicker, I think, to the nub and the heart of the question you have.

Appendix C

Assuming then that we do have the jurisdiction, we feel that there are two equitable considerations the Court should give consideration to and to find jurisdiction on those grounds.

Now, the first one is because of a provision in the New York State Constitution which calls for the Constitutional Convention or at least the opportunity to call on. The Legislature on the last occasion when the twenty years came around did not do it.

Now, I am very well aware of the fact that the Attorney General of the United States takes the position in the reapportionment cases that are being argued next month that a convention involves many issues, and that there may be people in favor of apportionment who would be inclined and even obliged to vote against the convention under the ground, that I particularly called to this Court's attention the fact that in New York State when this came up Governor Harriman went way out of his way with all the power and means of his office to broadcast that there was a very valid reason for conveying a Constitutional Convention, and he was talking about apportionment. Still the people turned it down.

Now I am inclined to agree with the view we have taken in the briefs that people may not be deprived of their personal constitution, and we are talking about the Federal Constitution now, merely because other people have the opportunity to correct the inequality but don't choose to do so. We run into that all the time. We do it with respect to the Suffolk County Charter.

Now, when the Suffolk County Charter came before the people it required, first of all, two things, special legislation and it also required a home rule resolution of the Board of Supervisors which was then acting under Section 153, and it also came up for a vote of the people of Suffolk County. They had an opportunity to accept this

charter with this Section 203 in it, or to reject it, and they accepted the charter, and we have some interesting statistics in Mr. Cromarty's affidavit, and they are not on the tip of my tongue, but my recollection is that the yes votes in the two towns that were represented by the plaintiffs in this action was sufficient to offset all of the no votes for the entire ten towns. So there we think that right of the people which they exercised only two or three years ago is indicative of the fact that they were not unhappy.

Even the people in the five western towns where all the heavy populations are, they voted overwhelmingly for it. It was the eastern towns, the rural, if you will, towns that voted against it. So we think that those equitable considerations are important.

Now, we still think, and this is in conclusion, that there is a necessary party missing here, and when I bring that up I am certainly very much mindful of the observation that Judge Bruchhausen made in his opinion when this motion was first made before him, that that point was not strongly urged nor is it tenable, but we respectfully disagree.

Now, we say that in view of the relief that has been asked for, that you can't get what Rule 19 requires, and that is complete relief merely by making an order at this stage effecting the people who are parties to this action. And if we come back now to my preliminary opening remarks, they want to enjoin the defendants from acting until a constitutional change in their relative voting strength is made.

Now, if what they ask for is granted, the injunction is granted, the Suffolk County Board of Supervisors would be restrained from acting, period. They wouldn't be able to do anything.

Now, until when? Nothing that this Court is going to

order any party to the action now is going to have any effect on it.

In the WMCA case, Caroline Simon and the Secretary of State was made a defendant, and the Attorney General was, and other people who had to do with the process of getting things done at the State Legislative level. But those people aren't parties here. There is no compulsion to the Legislature to change the statute with respect to what happens in Suffolk County.

Now, we say that they are asking for only half relief in asking that the County be without any effective government indefinitely. Certainly we feel that no Court is going to bring about that result.

Thank you very much.

Mr. Block: May it please the Court, my name is Frederick Block, one of the attorneys for the plaintiffs.

At this time I would like to extend Mr. Cahn's apology, the attorney for the plaintiff, for not being able to be here this morning. He is engaged in a rather serious criminal defense in New York City. It is a first degree murder case. He was looking forward to being here and he has entrusted the plaintiffs' case to myself.

Now, I guess I should start by saying that I do not represent the Wednesday ladies bridge club, but I would like to first point out——

Judge Dooling: Which end of the spectrum are you at, the bridge club end or the legislative end?

Mr. Block: I think we realize the drastic difference between the county and the ladies bridge club, and I think it is more on the Baker versus Carr situation than it would be in the other end of the spectrum.

Judge Dooling: Because I think the question is meant to point up and simply to say, as you have said, that there is a numerical disparity which answers nothing unless it is a disparity with respect to a voting power that operates

in a significant realm, and nobody has yet been able to describe to us what is the significance and what are the dimensions of the realm in which whatever legislative power exists here operates.

There certainly, as far as we are talking, simply about execution of administration and laws, there is no case, is there?

Mr. Block: Well, I agree that the ribbons must come to an end at some point, and I feel, however, that the lines to be drawn are not based upon the degrees of the municipality involved, that is State vis-a-vis County vis-a-vis Town, et cetera, right down the line.

We propose a different standard, but I would like to just briefly mention before I get into that, that I want to discuss the jurisdiction of the Three Judge Court briefly.

I would point out to the Court that we have submitted an additional memorandum touching upon this.

Now, I would like to point this out. We do not necessarily advocate the convention of the Three Judge Court. We read this as an anachronistic statute, it has been termed that by some of the commentators, and we look at it in horror because of the duty that is placed upon the District Court even to appoint a Three Judge Court or to act as a sole District Court.

We want to avoid the fate of the plaintiffs in the Epstein case where they went up and down the ladder three or four times before they finally found the right court to appear in. We don't want to be subjected to this. We want jurisdiction to be properly vested. We do feel, however, that the breath of this case, the significance of this case is one of state-wide concern, that is transcends the boundaries of Suffolk County, and Judge Dooling was careful to point out our basic argument that if Section 203 of the Suffolk County Charter would be stricken

then the system would not be changed; it would be governed by Section 153, Subdivision 4 of the County Law.

Now, I point out to the Court now a memorandum situations where the County District Attorney was enjoined under the Three Judge Court; also where a local bus driver in the Browdabey-Gale case was even held to be subject to the jurisdiction of the Three Judge Court on the principle that he was enforcing a state-wide policy in excluding certain people from riding on buses down south who failed to comply with the segregation orders of the State. So it is not necessarily the name of the person——

Judge Dooling: He was, is that what you would call it, under the customs thing or as an officer of the State?

Mr. Block: It was held he was I believe in effect acting as an officer of the State in that capacity.

Judge Dooling: Because he was implemented under State law.

Mr. Block: Exactly.

Judge Dooling: Of state-wide——

Mr. Block: Of more than state-wide significance. I should say national significance.

I don't think it matters what the particular name of the particular officer is. I think you have to look at the substantive area that is involved and to the scope of his duties and the powers that he exercises.

Now, of course you are familiar with the argument, but I do want to call to your attention again on an additional memorandum of law that we do not advocate, we want jurisdiction to be properly vested, but that we urge that jurisdiction should rest in the Three Judge Court.

Now, I would like to try to touch initially and exclusively upon what I consider and what I conceptualize to be the heart of this case. I think theoretically we present a very tight case. I think that the practical con-

sideration and the major consideration will simply be how far do we extend the principles of Baker versus Carr.

Our complaint in many respects is a Chinese copy of Baker versus Carr.

Judge Dooling: Is it at all, because here each supervisor is a man of dual aspect. He is first and foremost and is elected and must be elected to be supervisor of his town, that is the office to which he was elected. Then he is ex-officio a member of the Board of Supervisors of the County.

Now, so far as each one of these men is elected to be the supervisor of his town, there is not and there cannot be a complaint that one man one vote applies. So what you are really attacking here is the power of the State of New York to constitute a county government which is made up of the supervisors of each town.

In other words, can you have, as it were, what you might call a council of the county, a government of the county, in which each one of the legislative officers was the representative of a town just like the ministry in the common market in the various countries. Nobody would suggest that they ought to vote in proportion to the population of West Germany, Luxemburg, France and so forth and so on, because it is one ministry one vote, so here one town one vote.

Mr. Block: Yes, your Honor, that is exactly what we are challenging, the concept of representation by towns and not representation by towns and not representation by citizens of the counties. But when I alluded to Baker versus Carr, what I really meant——

Judge Dooling: That raises the horrifying parallel of treaty making power of the United States which operates in terms of the President and the Senate, and which is not one man one vote.

Mr. Block: But that is provided for in the Constitu-

tion itself. Comparable to that would be the argument that is made that well, on the Congressional level we have a Senate and we have a House of Representatives. I think the easiest answer to why we don't have both Houses represent the people and why we have one represent the Senate is because the Constitution provided for it that way.

Judge Dooling: That goes back, I guess, in the case of Suffolk in 1683——

Mr. Block: That is right. And it may have been perfectly constitutional, if that same number of people in 1683 lived in Suffolk County today.

Judge Moore: I am just wondering about the mathematics of the situation, and without reflecting on Shelter Island, using their supervisor as the lowest common denominator, although I am sure he may be of intellectual superiority, it would be necessary, would it not, if you were going to carry through your weighted vote to give 100 votes to Islip and one vote to Shelter Island, and in units of 1300, because I am assuming that if you create a unit of 5000 you can't have very well a third or a quarter of a supervisor from Shelter Island. He would have difficulty, I would think, in exercising his quarter vote.

Now, the other alternative which would be equally interesting is to say we shall have a hundred supervisors from Islip and they will all meet together, and then out of the 100 I suppose you could have the possibility that 51 would think one way and 49 would think the other way in representing the electorate of their local town.

Now, I just wonder where it would end up because if you have to have 600,000 people represented in units of 1300, you will have to build a new convention hall out there somewhere.

Mr. Block: I agree with your Honor. However, we

do not deal with that aspect of the problem for a very specific reason. I think it would be presumptuous on the part of us to try to act as some sort of constitutional convention or a convention that would change the existing law. We do have feelings of our own, and I think they are of a private nature and they ought to remain a private nature. We do, however, ask that the present system be declared unconstitutional.

I can suggest other alternatives, and maybe somebody like Ruth Silver could suggest another thirty-eight that would apply to the county just as she did with the State. We could have all the people elected by the county at large. We can withdraw the town lines for the purposes of county elections.

Judge Dooling: Really you are saying that the State of New York simply cannot have county government which exists in town representation, not distinguished from individual representation.

Mr. Block: With one qualification. They can have representation by towns as long as it does not result in an invidious and geographic discrimination on the basis of the citizens votes.

Judge Dooling: In other words, as long as you are substituting invidious discrimination against towns for invidious discrimination against individuals, that it saves constitutional attack?

Mr. Block: Well, I think that perhaps if we represented ten towns and we had the same basic situation except——

Judge Dooling: Doesn't it suggest the possibility that the reason that you have one vote one town is because what the legislative powers of the Board of Supervisors have delegated to them are essentially appropriate to that sort of representation?

Now, I couldn't help noticing that all I could find out

on what local powers or counties are is that the county at least cannot adopt a law providing that workers in resort hotels be fingerprinted. That is, a county had no power to do that. Now that strikes one familiar with Suffolk County as rather odd, because it is a resort county. But they can't do that. They can't pass local laws to the fingerprinting of hotel workers.

Now, what in the world can they do then, and how do we know that there isn't a peculiar appropriateness of one vote one town to the sort of legislative power the counties can exert under this delegation to them of the power to adopt local laws relating to the local property affairs in government.

Mr. Block: Well, we have detailed in our complaint some of the powers.

Judge Bruchhausen: I would take it that Judge Dooling's presentation is somewhat minimizing the state-wide influence, isn't that so?

Mr. Block: Well, as I understand Judge Dooling, check me if I am wrong, you throw out for consideration the possibility that the county may be the proper repository for certain duties that ought to be exercised in a town, and that it is the proper place for it, and that we are really not concerned with whether or not it is fair representation in terms of equality of voting rights because that which has been delegated to the county and the county to the town is really of no constitutional significance or important enough for us to bother with.

Judge Dooling: But that it is appropriate to one town one vote types of legislation, rather than one person and one vote types of legislation.

Mr. Block: I can debate the role of the county in the State Government. I think they play quite an important role.

Judge Dooling: What is typical of a county local law?

Mr. Block: Of course, the power of taxation comes foremost to mind. The taxation of property on a county-wide basis.

Judge Dooling: Taxation to what end, roads?

Mr. Block: It is applied to many county functions. To schools, roads.

Judge Dooling: Not schools because we have a consolidated school district in Suffolk County.

Mr. Block: But as far as the assessments are concerned, the county has a hand in this.

Judge Dooling: I think the school tax is levied by the school board.

Mr. Block: Yes. But the duty of assessment to some degree imposes on the local municipal government too.

Judge Dooling: Doesn't each town assess the properties within the town?

Mr. Block: Yes.

On the county level the administration of the roads, the various public services which money has to be raised for to provide. We have a health service; we have a Department of Public Welfare. This involves thousand and millions of dollars of the taxpayer's property which are administered on a local level by nature of the delegation of powers that has been granted to the county by the State, and thousands and millions of dollars of money are raised for county taxation for these purposes.

Judge Dooling: Do you mean a county can have a local welfare law?

Mr. Block: We have a Department of Public Welfare in Suffolk County. That is a rather important delegation of authority, I would say.

Judge Bruchhausen: I am not clear on the taxation.

Is the taxation on a county level, generally, or on the town?

Mr. Block: By the town level. But the county provides

for the disbursement of these funds to a substantial degree, which is really what we are talking about here.

Judge Dooling: What it is that does not come through to me is what in the world it is, what is the contents of the legislative power that we are talking about, and what does it relate to, because I think we have to have in mind that with a State like New York, which has an aggressive home rule policy, the towns choose to have home rule power so that the residuum of legislation, and I suppose that looking at any one legislative authority we can treat it in terms of local legislation not exercised elsewhere, is to my mind undefined by anything that has been said here today.

Mr. Block: We have detailed duties that repose with Suffolk County, under the Suffolk County Charter. That is clearly in our complaint.

Judge Dooling: It sounds mostly executive to me.

Mr. Block: Well, they appear in the complaint stated in part.

Now, I don't think we have to go past the first because I think you are speaking of a flexible concept. Whatever the duties may be today, there is no assurance that they may be the same tomorrow or next year, or that they were the same last year.

Section 1, Paragraph 6 provides that the County has all the power of legislation as provided in Article 9 of the Constitution of the State and Suffolk County. I think if you read that particular section of the Constitution it certainly affords great flexibility.

Now, it is curious to note that if the State Legislature exercised as much flexibility as it had delegated to the counties under the home rule concept, that in effect wouldn't it be scurrying the effect of Baker versus Carr, that representation as far as these powers are concerned is no longer based upon voting equality as it should be

in the State level. If it applies to the State level, should it not also apply to a delegated branch of the State?

I think there are two concepts here, the powers that a State can delegate to a county, and this comes under your home rule concept, and also whether those delegated powers are being exercised in a constitutional fashion.

Now, the home rule argument to me is the greatest argument in favor of our position because there is the tendency to give to the county power each year, and we do not argue with this. The policy of home rule we are not here to debate. But we know that the more control the county will get under home rule, and it seems to be increasing every year, the more valuable and more significant this type of lawsuit becomes, because we have situations in Suffolk County where in effect we have two counties. We have a police force that applies to the western end and not to the eastern end, and we have a new district court system that applies to the western end and not to the district end.

They are talking about a new sewer system to apply only to the western end and not the eastern end, and progress has been impeded because they had to balance the interest of the east and the west.

People now feel, we feel, and the plaintiffs feel that progress has been impeded because of the inherent unconstitutional restriction in the system.

Judge Dooling: In other words, if they gave an elaborate sewer system in the west end that would be paid for by county-wide tax, people on Shelter Island would have to pay a tax for the west end sewers, then naturally they would vote against it, and might defeat it, and the other smaller towns could defeat it.

Mr. Block: Exactly.

Judge Dooling: On the other hand, if it is passed they wouldn't have the sewer but they will have to pay for it.

Mr. Block: They have their cake and they eat it at the same time in many ways.

Now, I would just like to re-emphasize one thing. I am not opposed to the east end at all. I am just opposed to unfair representation. Ours is not a weighted vote case. It is an unfair representation case. Weighted vote seems to be attached to this for some reason. I don't know why. It doesn't appear in our papers, it doesn't appear in our complaint. Perhaps it is a ready nomenclature and an easy one.

But just to re-emphasize the situation on the Board of Supervisors, today those supervisors who represent 9 percent of the population have an effective veto power, and if there is a situation where there is a five-five vote on a problem of changing the county seat or changing the form of the voting structure or the form of government, the county executive, who is the only person who is voted on by all the people in the county, is excluded from voting to break that tie. The only one who is truly representative of all the people cannot vote as to the form of government that should prevail in Suffolk County. Now this is the practical problem that we have. You can very easily see how the five eastern towns have an effective vote power. And 18 percent of the population, if one of the western towns joins in, can in that legislation not favor by 82 percent. Now this is not constitutional. It is just a question of whether the Federal Court is going to take cognizance of this in light of Baker versus Carr.

Judge Dooling: In other words, where you have one man one vote, is it a constitutional imperative, or is the only constitutional imperative that there be a rational foundation of the system of voting?

Mr. Block: Well, of course the Supreme Court of the United States said that once the political subdivision is chosen, one man one vote——

Judge Dooling: Wait now. In there you were talking about a government typically to be elected for the entire State, and the Fulton County primary voter was not accorded the same voice in electing this one man or nominating this one man on state-wide basis as the fellow——

Mr. Block: There is that distinction, I quite agree, because as far as elections in the Town of Brookhaven are concerned, there is nothing unconstitutional about it. Everyone has one vote for the supervisor.

Judge Dooling: And each supervisor insofar as he is supervisor of his town is elected on an ideally one man one vote basis?

Mr. Block: Absolutely. But what right does he have to exercise more power over the citizens of the Town of Islip by nature of his authority on the Board of Supervisors?

Judge Bruchhausen: But the supervisors of the town, I take it, have powers separate and apart from the members of the county-wide board; isn't that right?

Mr. Block: Yes, the chief executive and the chief legislator of the respective town.

Judge Bruchhausen: And what powers, for instance, would they exercise in the town?

Mr. Block: Well, it would be zoning matters, for example, when the towns convene for a zoning board. It would be matters of local administration——

Judge Dooling: Establishing a police force, determining the compensation of its members, determining whether or not they will join a county-wide police force to keep the one they have?

Mr. Block: And also to raise assessments of local property. Of course, the most important function would be in the area of taxation. They work with the State equalization board in this respect.

Judge Dooling: To build parks?

Mr. Block: Yes.

Judge Bruchhausen: I take it then from your position that if there were a change made of one man one vote, that whoever the supervisor or supervisors are who figure this out would still retain the powers that they have in relation to local government in the town.

Mr. Block: I believe so.

Judge Dooling: Now, Riverhead, Patchogue, they also have powers of local government.

Mr. Block: That's correct.

I would like to elaborate on that because I think this is a serious problem. I can't see extending this same concept down to the most minute level of government, but I don't think that this would necessarily follow because there comes a point where you cannot claim an irrational system because the unit becomes too small.

If you have a village of 500 people, how can you possibly claim lack of justification of an unconstitutional invidious discrimination. You are dealing with a small unit of government.

Judge Bruchhausen: Let me ask you this: When we get down to small, have you a figure in mind what is small and what is large?

Mr. Block: I would be happy to use your figure.

Judge Dooling: Suppose the village passes an ordinance which in effect routes all of the traffic away from the Smith Supermarket and the Frederick Jones Supermarket and they do it because they have some kind of mad ward voting. Now it can't be the size question. It must have something to do with ultimate rights.

Mr. Block: I would think so. As a practical matter, we don't have this problem when we are dealing with a very small unit. Even on the town level there is general

election of all officers by all the voters of the town. It is not a cumbersome procedure.

Judge Bruchhausen: Then you get back to that general statement that is significant as far as statewide acts are concerned; isn't that right?

Mr. Block: Yes. And I think that in your situation you can also apply, as far as the jurisdiction in the Federal Courts are concerned, whether or not the state-wide consideration has such a great interest on a local village level to warrant the Court taking jurisdiction. I think this would answer the jurisdictional problems here. But I think on the county level you have a much more severe type of situation.

Judge Dooling: Under the county law and under the Constitution, don't the people of the county of Suffolk have in their own power, in their own hands, the power to change this voting system if they don't like it?

What about McClusky's theory that all you are really interested in is whether or not there is intact an unimpaired potential exercise, a political power of self-relief. Now don't the people of Suffolk County have the political power of self-relief under Article 9, Section 2 under the County Law?

Mr. Block: I don't think so.

Look what happened when the Suffolk County Charter was approved just several years ago.

Judge Dooling: And your people voted for it harder than anybody else.

Mr. Block: Yes. But with the new change in the system of voting representation, why not, because before the Suffolk County Charter was drafted it was passed upon in effect by the County Legislature, and not only did they make sure that the old theory one vote one town remained, but they also insured that the local government would not

be changed by providing that the county executive could not change it.

Judge Dooling: Is it your point that you cannot effect a change in the county voting procedures at the initiative of the people except through the concurrent action of the Board of Supervisors as it presently is constituted?

Mr. Block: I would say yes, with one exception. I think the Constitution will allow the Governor, under certain circumstances the State Legislature, to call a special convention or a special referendum. This you can always do. But anything that comes from the voters of Suffolk County that is initiated at that level and not at the higher level will have to pass through the Board of Supervisors and will never do so.

Judge Dooling: Well, you don't know, and you are assuming that the bias of number is built into the mind of each supervisor, and perhaps you will have to assume that for the purposes of the case.

Mr. Block: I think we can assume this, that no case, Baker versus Carr or otherwise, would ever be in the Federal Court.

I really don't think this is a major obstacle at all. I think that the Court is flexible and imaginative enough, there is no doubt in my mind, that if they do want to decline jurisdiction they probably could find a way of doing it.

You go through the Federal laws and you see all sorts of ways that the Court can refrain to exercise its jurisdiction.

Judge Dooling: I think the most important thing that was said was that it is a distant area in which non-interference is the general rule. And interference comes only when it is necessitated as a tendency where the allegation was that the people were content for sixty years to help themselves. Here as your adversary has pointed out, at

least at the moment there is a constitutional approved legislature in a forward looking liberal minded home rule minded state, which is competent to rectify this situation if it has the will to do it, and which has manifested an interest in the subject matter currently, and in fact has it before the people for further study right at the moment.

Mr. Block: I can point this out to the Court, it is in the papers, that the motion was made before the Board of Supervisors just prior to our case being argued before Judge Bruchhausen, that we believed a referendum should be had to change the form of Government, and it was turned down. It was turned down by a unanimous vote. Now we can't discern what was political and what was really governmental in that vote.

I think that on the area of abstention, that I must point out at least two things. First of all, the New York State Court of Appeals has indicated and has stated, as I read the Burns case, the matter of Burns versus Flynn, that it will only take jurisdiction in the apportionment area, the representation area where the New York State Constitution has a mandatory provision.

Judge Dooling: Wait. I have read one New York case, I forget the name of it, in which the Kings County Board of Supervisors sought improperly to set up assembly districts, and the New York Court of Appeals without any hesitation at all set the whole apportionment aside.

Mr. Block: That was punishment to a constitutional mandate, wasn't it?

Judge Dooling: I can't recall whether they were doing it on any other basis except the basis that it was all wrong, because it was not in conformity with the usual provision for the apportionality of representation.

Mr. Block: However, I do point out the Flynn case. It reads for itself. I think that whether we can perhaps

speculate as to whether the Court of Appeals will take jurisdiction, maybe possibly they would; but I think the Flynn case points up enough of a ghost to partially scare us from going into the State Courts initially and have it then go to the Court of Appeals to find out whether they will take jurisdiction of this type of a case.

Judge Dooling: Now, in the case alive there are so many problems that relate to the history and the structure of the Government of the State of New York that it would be the sort of case in which the Federal Court might well at least suspend its action pending some formidable adjudication to stay.

Mr. Block: But interpretation of what statute or interpretation of what provision of the constitution? The only time that I read the case where the Federal Courts have refrained from exercising their jurisdiction is when there is a complicated series of State actions which have yet to be interpreted by the State Courts. I don't see where we have a parallel construction here at all. We have just one statute, one vote one town——

Judge Dooling: Well, in my experience the rationale there for the one town one vote thinking——

Mr. Block: This is the obligation of the defendant, and he is willing to rely on a prima facie case that we assert in the population. I would think that this would be something that would be more meat for a trial of the action, and the defendant has waived his opportunity to put in such evidence. This to me is an evidentiary factual situation, but it has nothing to do with jurisdiction. This has nothing to do with the statutory construction.

Judge Dooling: It has to be the kind of State judicial action that could in effect give a special meaning to an existing statute such as the Courts would then have to accept.

Mr. Block: Your Honor, if I may extend on your

argument, I respectfully submit that your theory would preclude jurisdiction in any of the Baker versus Carr cases, because in each one of them historical justification has not been excluded as a possibility of showing some rationality. And to extend it even to our local level, the WMCA case was reposed with the Federal Court and they did not there hold that because the State had the right to amend its constitution, et cetera, the New York State Courts should first take jurisdiction.

I think that there are cases knocked out of court, so to speak, on this ground, and it can only be for the reason, I submit this humbly, that the Court does not want to extend itself into this area.

Judge Bruchhausen: Isn't the background of some of these cases in the United States Courts pretty much founded on the difficulty or the possibility of the electorate to exercise their will in many of these situations?

Mr. Block: Yes.

Judge Bruchhausen: The one that has been stated here, they have been endeavoring to do something about it for twenty years. Now, it has been mentioned here that you had this vote for the charter only two or three years ago. Now that was an opportunity for the electorate to pass on this provision and all of the others of that potential charter; isn't that so?

Mr. Block: Yes.

Judge Bruchhausen: Now, do you say that the electorate has not had the opportunity to act on this matter?

Mr. Block: We do say that, and if I am allowed to elaborate, I think I can convince your Honor of our position.

First of all, before I even bring this down to specifics, in our appendix that we submitted today I called the Court's attention to Thigpen versus Meyers (phonetic) where the issue is of whether or not a referendum would

prevent the Court from taking jurisdiction or should be of some consequence, and the Federal Court had this to say:

"We are asked to decline jurisdiction because the voters of Washington at the general election on November 6, 1962 defeated the initiative measure designed to reapportion the Washington Legislature according to population revealed by the Federal Census of 1960. Our answer is concise and direct. We have no way of knowing whether the measure was defeated because a majority did not desire a reapportionment, or whether they did not approve of the proposed method or whether they didn't understand it. There were numerous other complicated matters on the ballot, or whether the opponents were better organized than the proponents.

"It makes no difference. The inalienable constitutional right of equal protection cannot be made to depend upon the will of the majority."

Now, we don't have to go that far in our case, because as we are well aware, Section 2 and 3 of the Suffolk County Charter made no change in the county law as far as representation of the Board of Supervisors other than to deny to the one representative officer, the county executor, the power to vote to change the form of government.

Judge Dooling: To take the casting vote away on that issue?

Mr. Block: Yes.

Now, if the people would have defeated the charter, what difference would it have made?

Judge Dooling: How did the charter get drafted, by a charter commission?

Mr. Block: Yes.

Judge Dooling: Who appointed the charter commission?

Mr. Block: I am sorry, I don't know.

Do you know the answer to that?

Mr. Corwin: Over the period of two or three years that this matter was before the Legislature there were drafts that eminated from the then county attorney's office. There were two commissions. They were not appointed by anyone. They were generated from the wish of the people. The citizens got together and offered their services. In some cases they dipped down into their pockets and paid money, without any tax monies being involved at all, to engage the expert services of professional people to do the study.

Judge Dooling: Well, was the drafting of the Suffolk County Charter controlled in this voting respect by the existing personnel of the Board of Supervisors, or was the power to put in a different method of voting, such as Nassau County, available to the people who were working on it, and what's more important to the Legislature?

Mr. Block: I don't know the answer to that. I can only say that I can't see how the constitutionality of that is going to be affected by a handful of people.

Judge Dooling: Then we come to the next question, and that is, I suppose, would you argue that this method of voting was bad even if it was imposed by the Legislature as a matter of original construction, original thinking on its part, or if it were simply innocently put into a drafted charter of historical reasons and the charter was then adopted by the people of the county, would you still say it would be bad? In other words, that neither legislative choice nor popular election within the county can deprive people of the right that you assert on behalf of plaintiffs?

Mr. Block: I would say that definitely. Whether we have to go that far in this case, I don't know.

Judge Dooling: In other words, you go all the way

back and reopen the gate between Hamilton and Jefferson of whether the majority rule is an absolute, or whether there is an inalienable right such as the one man one vote right.

Mr. Block: I think the 14th Amendment speaks very clearly on the value of the citizens vote.

Judge Bruchhausen: Do I understand from this discussion here that this pattern which you incorporated in the charter for voting for supervisors in towns is the same pattern that has existed for many years in Suffolk County?

Mr. Block: Yes.

Judge Bruchhausen: So it is not a change of pattern of voting for supervisors?

Mr. Block: No, it is not a change of voting.

I think the one thing that possibly might be slightly overlooked is simply this fact, that there is nothing in the New York State Constitution that says that every county must be governed by a Board of Supervisors and that we must have representation by towns.

Judge Dooling: Isn't this true, that county bounds are not constitutional but legislative, town boundaries are not constitutional but legislative, and that the Legislature can at any time redraw every county line in the State and every town line in the State?

Mr. Block: I would say yes.

Judge Dooling: It surprised me but that seems to be it.

Mr. Block: It has been done.

Judge Dooling: Is that right?

Mr. Block: Yes. But what we are talking about is the delegation of authority and the proper exercise of the authority that the State would have if they were not so delegated.

I would like to pose this question, and I think it is the ultimate question, if we accept Baker versus Carr and

WMCA, and certainly WMCA that there cannot be an invidious discrimination on the State level of government. True, after the trial it determined that based upon the standards that the Court adopted there was no discrimination, but the ultimate rationality of course would be that if they were not functionary they would strike down the system.

Now, if we apply the standards of WMCA to the State, how can you then say that the State has the power and the right to delegate those powers which if it retained would have to be exercised according to the constitutional mandate as dictated by WMCA and Baker versus Carr. But now it can delegate those powers properly and it doesn't give a blessed care how those powers are exercised, whether they are representative of the voters, whether they are representative of the towns or whoever else may be in the county.

I think this is the crux of what we are talking about. All we claim is that the same standards that apply to the State must apply to the powers which it delegates to the county, which is a branch of the State, and which has no sovereign immunity of its own.

Judge Dooling: Would it even get to the point where you would have to equalize all school districts?

Mr. Block: Well, I would say if we come to this course there is no problem. The problem in the school districts is you vote for all the members of the school districts. Once a unit is chosen there is only one person there.

Judge Dooling: I suppose they have no county-wide or state-wide powers.

Mr. Block: The only time we are faced with this problem is when we have vicarious representation, and the only time we have vicarious representation is in this situation where you have towns and by the nature of their town position they serve also as the legislature of the county. I call this vicarious representation. I think this is

unconstitutional if it does not represent the voters of the entire county who they purport to act for.

Judge Moore: Wouldn't it follow, Mr. Block, logically that every enactment by the legislature is a delegation of its authority, and no matter how small and localized the unit it still derives from the sovereignty of the State through its legislature?

Mr. Block: Yes, your Honor.

Judge Moore: And if we follow the agency theory, as Judge Dooling points out, don't we get into quite a lot of trouble because we are then forced to say that every hamlet in the State, being subject to ultimate State control if the laws were all repealed, would have to go on a one man one vote basis for everything?

Mr. Block: I think that the Supreme Court has already said this.

Judge Bruchhhausen: I want to bring up as to the fact that the Borough President in each of the boroughs of the City of New York is, I have forgotten how many votes, but each one has the same number of votes in the Board of Estimate as I understand it.

Judge Dooling: I don't know whether that is true under the new charter.

Judge Bruchhausen: That is my understanding, and I would be glad to be corrected if I am in error on it.

Here each one of these Borough Presidents, I take it, represents a borough which is entirely different in size or population than each other borough.

Mr. Block: With the exception of Richmond, I think Richmond would present the only problem. The others are roughly comparable, and it is easy to rationalize the others.

Judge Bruchhausen: At least you don't have as far as the Board of Estimate is concerned one man one vote disparity. They represent a borough somewhat the same

as a supervisor would represent a town on the overall group.

Judge Dooling: Is it correct that you have to show that one town one vote is an irrational method of governing the county?

Mr. Block: Yes, I would say so, and I would say that the population disparity such as we have in our case creates a prima facie case of unconstitutionality and requires the defendant to forego and show that he is rational.

Judge Dooling: Well, I suppose it is one town one vote, but there is no proportionality between the vote and anything. In other words, the vote isn't proportionate to size, to population, to taxable values, to a number of trees, to acres of potatoes or anything else. I mean this is representation in proportion to historical accident.

Mr. Block: The historical accident as developed through the population influx throughout the years.

It is really a flimsy criterion because our problem has only resulted in the last ten to twenty years, not the last 100 years. I feel that the county concept of government is predicated upon a homogeneous grouping of common people and by and large this problem did not exist in past years, and the town was just invented to aid in this government. But we have in Suffolk County a heterogenous grouping because of the 140 miles in length, because of the 15 miles in width, because of the tremendous population that has eminated from New York City and from Nassau County, and to me this is inapposite to the concept of county government, that we have a heterogenous grouping diverse interests, diverse types of people, population disparity, many other dis-

parities, and we feel that because of this the situation has been created, not through history, but because of the history of the past ten or twenty years.

Now, I don't think history itself, the fact that this history has existed hundreds of years is just cause for the population disparity we have at the present time, because for all we know, if this case was brought in 1600 we may have no case. Maybe that is the reason why they were towns initially.

Judge Moore: Isn't the perfect solution, Mr. Block, for the Court to adjourn this motion in this case for ten years, and by that time it would probably become quite moot because the population of Islip and Brookhaven, already crowded, will keep pushing out and they will even put a bridge over to Shelter Island, and Shelter Island will have as many ranch type and split levels as the potato fields that the eastern end of the Island now have.

I appreciate your problem because it is a constantly shifting one, and there is no doubt it did not exist in, what was it, 1683, or whenever things started. This may have come up over the last ten to fifteen years, this enormous population change or migration.

Mr. Block: I don't think there was much of a population problem in those days, and, of course, there was no constitution those days. I think that some significance should be attached to that.

In answer to your question, Judge Moore, I think that the first question to ask is whether or not the constitution allows us, if we accept the fact that there is an unconstitutional discrimination now, whether to prolong this for a period of years and hope it would change. Certainly, why didn't they do the same thing in the Baker

versus Carr case? This could always be justification for prolonging a situation.

Judge Moore: Of course, I didn't mean that you don't have the right to press the wide disparity of the situation as of any given moment, and it could change, and they will still be able, I suppose, to assemble three Judges at sometime or other during the next ten years as well as today.

Mr. Block: I hope the same three, your Honor. But, of course, the problem exists at the present time. In ten years if the present form of government continues, we do not know what would be there for the people to enjoy. We feel that now that the east and the west ends, so to speak, are in such conflict with each other, that we need to have more opportunity in the west end to allow for the increase in population. The east does not have this problem at the present time.

Judge Moore: I was just going to say that I think that you both presented the problem, and if we take Judge Dooling's analogy of the spectrum, just as we know in the laws of physics the colors are not clear, they blend one into the other from one end to the other, it is just a question of where this fits in. Anything that either of you can give us more than to have, knowing that I think that that may be our way of thinking, because on one end we know that we would have one answer, I think, and on the other end we have the answer that the Supreme Court has given in the more radical Tennessee and possible Georgia.

I am personally more familiar with the Florida situation where the northern part of the State, the rural part of the State is certainly controlling a city of several million people such as Miami. You have there as exaggerated

a development as you have between Shelter Island and the Town of Islip from the standpoint of disparity, but there their problems were on a little higher State level which is easy to categorize and place in one department.

I think that you are very much like the needle of the electric hand meter that wavers around in that middle area; it either goes all the way over to show that you are overcharging or all the way over to show that you are in trouble. So that if you can focus the spotlight of clarity on a very difficult and nebulous area that would be helpful to us, I am sure.

Mr. Raab: Your Honor, on behalf of the Attorney General, I would make but one request in light of our very limited appearance here.

We were served this morning with plaintiffs' memorandum which in part answers our letter of the 25th. I have no wish to add to the documents before the Court, but we would like to re-examine the case law in light of Section 153, although I must say at first glance that I don't think that is raised by the pleadings here. However, if we do discover any light that our cases shed on 153, I would like the permission of the Court to submit an additional memorandum or letter to that.

Judge Dooling: I think that plaintiff's memorandum on the motion that was submitted to Judge Bruchhausen did raise 153, Subdivision 4.

Mr. Block: I think what Mr. Raab is referring to is that we do not specify Section 153 in our complaint. We attack the present system and the system is incorporated in 153.

Judge Dooling: Your argument as submitted originally to Judge Bruchhausen raised 153, Subdivision 4.

Mr. Block: Yes.

Judge Moore: I think, although I regard the Federal

Rules very highly, they were taken in part from a very popular musical comedy of some years ago known as anything goes, and that was my final question here.

I gather that the Court could regard this case in any one of many categories. We have the motion to dismiss on the pleadings. Since facts are alleged the Court should be privileged to regard it as a motion for summary judgment, and we would also like to regard it in view of the stipulated factual situation as if a trial had been held; so that our forthcoming decision, if it be forthcoming, ought to be able to regard this not as a motion attacking a mere pleading but as disposing of the issues on such matters as may exist.

Am I correct in that respect?

Mr. Block: That is my understanding.

Mr. Corwin: Yes, sir.

Judge Moore: Well, on that basis, I think we will take the papers.

How much time would you like, Mr. Raab, if any?

Mr. Raab: If we have any amplification it would be within the next day or two, your Honor.

Judge Moore: Off the record.

(Discussion off the record.)

Judge Moore: Gentlemen, thank you. We have enjoyed your argument.

Appendix D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil Action File No. 62-C-821.

I. WILLIAM BIANCHI, JR. and QUENTIN B. SAMMIS,
Plaintiffs,

and

TOWN OF HUNTINGTON,
Plaintiff-Intervenor,

—against—

BOARD OF SUPERVISORS OF SUFFOLK COUNTY, NEW YORK,
Defendant,

and

TOWN OF SOUTHAMPTON, TOWN OF EAST HAMPTON, TOWN OF RIVERHEAD, TOWN OF SOUTHOLD, and TOWN OF SHELTER ISLAND, ROBERT T. CAMERON, as Supervisor of the Town of Southampton; EDWARD V. ECKER, as Supervisor of the Town of Easthampton; ROBERT B. VOJOVODA, as Supervisor of the Town of Riverhead; LESTER M. ALBERTSON, as Supervisor of the Town of Southold; and EVANS K. GRIFFING, as Supervisor of the Town of Shelter Island,
Defendants-Intervenors.

Before: MOORE, *U. S. C. J.*, BRUCHHAUSEN and DOOLING, *U. S. D. JJ.*

PER CURIAM

By order dated June 15, 1966, this court directed the Board of Supervisors of Suffolk County to submit a plan

or plans for election of such Board in a manner eliminating the voting malapportionment in the election of the Board as presently constituted. Thereafter, the Board caused to be submitted various plans together with a resolution indicating its preference as to priority, namely:

1. The Hanse plan and modifications thereof referred to in Resolution No. 459-1966 as Plans A-E. Plan A is essentially a weighted vote plan preserving, however, the present method under which the Town Supervisors from each of the ten towns constitute the County Board of Supervisors. Plans B-E would add to the Board additional county supervisors depending on the population of the towns and assigning the number of votes on the Board in accordance with the populations of the towns electing the supervisors.

2. The Dominy Plan (Resolution No. 456-1966) provides for additional Supervisors to be added to the existing Board, one to be elected from each of the Assembly Districts (now six) in the county.

3. The Albertson plan (Resolution No. 463-1966) calls for the election of ten Supervisors by the County at large for terms of four years, five to be elected every second year.

4. The Ecker plan (Resolution No. 465-1966) provides for a bicameral legislative body with the present method of Board construction being preserved for an Upper House and a Lower House to be elected at large or from representative districts.

Objections were filed by plaintiffs and the Town of Huntington (1) to the plan (Resolution No. 456) calling for additional Supervisors for Assembly Districts; (2) to Plan A (weighted voting); (3) to an election at large plan (Reso-

lution No. 463); and (4) the bicameral plan (Resolution No. 465), and plaintiffs and the Town of Huntington moved to declare their probable unconstitutionality and to declare the probable constitutionality of Plan E (Resolution No. 459) which provides for a number of legislators (supervisors) from each town equal to the quotient obtained by dividing the town's population by 50,000, the number of votes to be shared by such representatives to be obtained by dividing each town's population by 2,500.

The defendants-intervenors being the towns of Southhampton, East Hampton, Riverhead, Southold and Shelter Island and the respective Supervisor defendants moved to declare the probable unconstitutionality of Plans A-E and to declare the probable constitutionality of the election at large plan (Resolution No. 463) and the additional supervisors for Assembly Districts plan (Resolution No. 456).

Hearings on the objections were held on July 28, 1966.

At the outset it is the opinion of the court that the plan (Resolution No. 456-1966) which would add to the present Board six Supervisors, one each from the now existing Assembly Districts, and the plan (Resolution No. 465-1966) providing for a bicameral legislative body for the County do not meet the requirements for constitutionality as set forth in the Supreme Court decisions on reapportionment. The court is also of the opinion that Plan A (Resolution No. 459-1966) is defective in that it provides for straight weighted voting by the Supervisors on the Board as presently constituted. The Court is reinforced in this conclusion by the recent decision of the New York Court of Appeals in *Graham* v. *ano.* v. *Board of Supervisors,* Erie County, New York, etc., decided July 11, 1966, (267 NYS 2d 383; 269 NYS 2d 477, modified by Court of Appeals July 11, 1966), wherein it approved such a weighted voting plan "but solely as a temporary expedient", stating that "Although weighted voting has inherent defects, it does provide

more of the attributes of equal representation than the existing apportionment of the Erie County Board of Supervisors." The Court of Appeals then preceeded to direct the Board "to draft a permanent plan, based on the principle of 'one man, one vote,' by September 1, 1966, and to submit it for the approval or disapproval of the electorate at the November 1966 election."

Although straight weighted voting may be defective, the Plans B-E by adding an additional member or additional members to the Board dependent upon population and by ratably dividing between the Supervisors from each town the votes given to the respective towns in accordance with units of population may avoid the defects noted by the New York Court of Appeals and also found in Plan A. As to the Albertson Plan, the election of its legislative body by the County at large would appear to resolve any difficulties as to mere equality of vote; there may be other factors than mathematical equality to be considered. However, the Plan is probably, if marginally, constitutional.

The present order of the Court will, then, be in substance that the Board adopt a Local Law modifying the present County Charter, so as to eliminate the present imbalance in the voting strength of the members of the present Board as related to the population of the towns represented by them to comply with the requirements of the Fourteenth Amendment of the United States Constitution and Article I, sections 1 and 11 of the New York State Constitution and the decisions of the Supreme Court on reapportionment and that the Board cause such plan or plans to be submitted to the qualified electors of the County at the general election to be held on November 8, 1966.

Such Local Law may present to the qualified voters inconsistent (see Municipal Home Rule Law Section 33 sd.9) plans, together with a clear provision that inconsistent

plans may be voted for by the elector and that the elector may vote for one plan or more and against one or more or all alternative plans, and that if one or more plans than one receive the required majority, the plan receiving the largest affirmative vote shall prevail. Such Local Law must be such that if it is made effective by the vote of the electors at the November 8, 1966 election, it will result in the election at or before the general election of 1967 of a Board of Supervisors to take office on or before January 1, 1968.

Nothing herein said and no action taken hereunder shall be deemed to preclude any appropriate action by the Board or any member thereof in the event that the present decision of this court dated February 15, 1965 now on appeal to the Supreme Court is reversed and such Local Law may provide for a termination of its effectiveness in the event of reversal.

This opinion constitutes the order in this case.

LEONARD P. MOORE
U. S. C. J.

WALTER BRUCHHAUSEN
U. S. D. J.

JOHN F. DOOLING, JR.
U. S. D. J.

Brooklyn, New York
August 4th, 1966

Appendix D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil Action No. 62-C-821

I. WILLIAM BIANCHI, JR. and QUENTIN B. SAMMIS,
Plaintiffs,

and

TOWN OF HUNTINGTON,
Plaintiff-Intervenor,

—against—

BOARD OF SUPERVISORS OF SUFFOLK COUNTY, NEW YORK,
Defendant,

and

TOWN OF SOUTHAMPTON, TOWN OF EAST HAMPTON, TOWN OF RIVERHEAD, TOWN OF SOUTHOLD, and TOWN OF SHELTER ISLAND, ROBERT T. CAMERON, as Supervisor of the Town of Southampton; EDWARD V. ECKER, as Supervisor of the Town of Easthampton; ROBERT B. VOJVOLA, as Supervisor of the Town of Riverhead; LESTER M. ALBERTSON, as Supervisor of the Town of Southold; and EVANS K. GRIFFING, as Supervisor of the Town of Shelter Island,
Defendants-Intervenors.

Before: MOORE, *U. S. C. J.*, BRUCHHAUSEN and DOOLING, *U. S. D. JJ.*

DOOLING, *D. J.* Dissenting:

I dissent from so much of the decision as suggests that Plans B through E of Resolution 459 may avoid the defects

of weighted voting found in Plan A. In view of the grave disparities in supervisor voting strength and the radical dilution of effective representation of the citizens of the more populous towns that would necessarily result, I am unable to say that any of Plans B through E of Resolution 459 is probably Constitutional. See *Shilbury* v. *Board of Supervisors*, 46 Misc. 2d 837, 842-843 aff'd 25 App. Div. 2d 688; *Graham* v. *Board of Supervisors*, 267 N. Y. S. 2d 383, 393-394, modified 269 N. Y. S. 2d 477, modified by Court of Appeals, July 11, 1966; *WMCA Inc.* v. *Lomenzo*, 238 F. Supp. 916, 923-924; Weinstein, The Effect of Federal Reapportionment Decisions on Counties etc., 65 Col. L. Rev. 21, 41-46.

JOHN F. DOOLING, JR.
U. S. D. J.

Brooklyn, New York
August 4th, 1966